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In the Supreme Court of the United St
October Term 1980

ELECTRICAL PRODUCTS DIVISION OF
MIDLAND-ROSS CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 14, 1980

QUESTION PRESENTED

Once a union representation election for Unit A and Unit B employees has been set aside is it inconsistent action in violation of *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969) for the National Labor Relations Board to require a bargaining order rather than a rerun secret ballot representation election for employees in Unit A but allowing a rerun election for those employees in Unit B when the effects of the Company's unfair labor practices apply equally to both Unit A and Unit B employees?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Electrical Products Division of Midland-Ross Corporation, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 22, 1980.

OPINION BELOW

The opinion below by the United States Court of Appeals for the Third Circuit is as yet unreported, and a copy of such opinion is appended to this petition as Appendix A hereto. In addition, the opinion of the National Labor Relations Board, the administrative agency in the case, is appended to this petition as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated and entered on April 22, 1980, and is appended to this petition as Appendix C hereto. A timely petition for rehearing in banc was denied by the said Court of Appeals on May 27, 1980 (Appendix D, infra), and this petition for certiorari was filed within 90 days of that date. An order staying mandate of the judgment of the United States Court of Appeals for the Third Circuit was entered on June 5, 1980 (Appendix E, infra). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S. Secs. 151, et seq.). The relevant portions of said Act are entered as Appendix F hereto.

STATEMENT

The National Labor Relations Board and the United States Court of Appeals for the Third Circuit have ruled that the Company's conduct pertaining to its actions in implementing the economic closing of one of its plants (the Del-Val plant) constituted unfair labor practices which interferred with the holding of a representation election at another of the Company's facilities (its Nylomatic plant).

In 1976 the United Glass and Ceramic Workers of North America, AFL-CIO-CLC (herein called the Ceramic Workers Union) filed a representation petition with the National Labor Relations Board seeking an election to represent employees in an overall bargaining unit at the Company's Nylomatic plant. Following the filing of another representation petition by the International Union of Tool, Die and Mold Makers, affiliated with American Craftsmen Association (herein called the Tool Makers Union) the Board's Regional Director set up two proposed bargaining units for the Nylomatic employees, called Unit A and Unit B. Unit A employees could vote whether or not they wanted to be represented by the Ceramic Workers Union. Employees in Unit B were given the option to decide whether they wanted to be represented by the Tool Makers Union in a separate Unit B, or by the Ceramic Workers Union along with the other employees in Unit A, or by neither (Appendix 959-962).

A representation election was held July 1, 1976, but based upon objections filed by both the Ceramic Workers Union and the Company the results of the representation election for both Unit A and Unit B were set aside and it was ruled that second elections be conducted (Appendix 1015-1016).

A rerun representation election was subsequently held in Unit B on March 23, 1979, but a rerun election was not held for employees in Unit A (Board Brief, page 57). Instead, based upon findings of category II violations under this Court's holding in *National Labor Relations Board vs. Gissel Packing Co.*, 395 U.S. 575 (1969), a *Gissel* bargaining order for Unit A employees was issued.

REASONS FOR GRANTING THIS WRIT

The issuance of a *Gissel* bargaining order for Unit A employees while allowing the holding of a rerun representation election for Unit B employees is unprecedented and clearly represents inconsistent action by the National Labor Relations Board.

The majority opinion of the United States Court of Appeals for the Third Circuit failed to directly address such Company's contention. In this connection the majority opinion stated: "Thus the NLRB did not make inconsistent findings because it was never presented with the question of whether a free election could be held in Unit B." (Appendix A, pages 23-24 infra.)

However, the Company's contentions concern inconsistent Board action rather than inconsistent Board findings. Even though the unfair labor practice complaint was drawn so that it was made unnecessary for the National Labor Relations Board to make findings respecting a *Gissel* bargaining order for Unit B employees, the fact still remains that the action of the National Labor Relations Board in conducting a rerun representation election March 23, 1979, for employees in Unit B is directly inconsistent with its *Gissel* bargaining order for Unit A employees which the Board issued November 17, 1978 (Board's Brief, page 57; Appendix 1207). There can be no dispute but that the same factual situation applies equally to employees in both Unit A and Unit B. The same Company unfair labor practices including the same speeches were given and letters sent to both groups (Appendix A, page 30 infra). It is submitted the fact that the Board allowed a rerun election for Unit B employees some four months after issuing a *Gissel* bargaining order instead of a rerun election for Unit A employees demonstrates conclusively that its issuance of the *Gissel* bargaining order in Unit A violated a fundamental premise stated by this Court in *National Labor Relations Board vs. Gissel Packing Co.*, 395 U.S. 575 at page 602 where this Court emphasized that a representation election, not a bargaining order, remains the traditional, as well as the preferred, method for determining the bargaining agent for employees.

The National Labor Relations Board would not have ordered a rerun election for Unit B employees unless such representation

election could have been conducted in an atmosphere free from any lingering effects from the Company's earlier misconduct. Accordingly, Petitioner submits that its application should be granted and that a rerun representation election for Unit A employees be ordered to prevent the continued misapplication by the National Labor Relations Board of this Court's holding in *National Labor Relations Board vs. Gissel,* supra.

CONCLUSION

Petitioner strongly submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT BELOW

Decision of the United States Court of Appeals
For the Third Circuit in No. 78-2556

Decided March 18, 1980

Before: SEITZ, Chief Judge, and ADAMS and WEIS, Circuit Judges.

SEITZ, *Chief Judge.*

The Electrical Products Division of Midland-Ross Corp. (the employer) petitions for review of an order of the National Labor Relations Board that adopted the administrative law judge's (ALJ) finding of numerous labor violations arising out of events at two of the employer's plants in Pennsylvania. The Board has filed a cross application for enforcement of its order.

I. *Factual Background*

In 1974, the employer bought two plants in Pennsylvania as part of a single transaction: the Del-Val plant in Tulleytown and the Nylomatic plant in Morrisville. The two plants are about seven miles apart, and both are engaged in the production of plastic goods utilizing molds supplied by customers. There was some integration of the two facilities, especially at the upper management levels.[1] In addition, records for both plants were stored at Nylomatic.

Nevertheless, the plants were not exactly similar. For example, the Nylomatic plant was non-unionized. At Del-Val there were two unions representing separate bargaining units: the United Glass & Ceramics Workers (Ceramics Workers) representing the production and maintenance employees, and the International Union of Tool, Die & Mold Makers (Tool

1. The record indicates that the following positions covered both facilities: operations manager, sales manager, quality control manager, purchasing manager, tool manager, and personnel manager.

Makers) representing the tool room employees. Moreover, from the time of the acquisition, the Nylomatic plant was profitable, but Del-Val was not. Although a consulting firm recommended in December 1974 that the employer divest itself of Del-Val, the plant remained open and members of the management made optimistic statements abouts its financial status during 1975.

The events with which the unfair labor practice proceeding was concerned took place in 1976. In January of that year, the employer assigned George Bickerstaff, one of its vice presidents, the responsibility for studying Del-Val's financial posture. He discussed various options with company officials, including closing Del-Val. In February, he formed a task force of top officials to study the employer's options as to Del-Val.

Sometime shortly after the formation of this task force, the Ceramics Workers began an organizing campaign at the Nylomatic plant. On March 1, the union sent out a letter and authorization cards to all Nylomatic employees. By March 10, the union informed the employer it had cards from a majority of all Nylomatic employees. On March 11, it forwarded 32 authorization cards to the regional director and filed an election petition. On March 25, the Tool Makers filed a representation petition seeking to represent some of the Nylomatic employees covered by the Ceramics Workers' petition.

During April, the task force studying Del-Val handed in its report. The report was pessimistic, and Louis Zharadnik, the employer's controller, began preparing a Project Appropriations Request (PAR), an analysis of the economic impact of plant closure. On June 4, he completed the PAR, recommending closure of the Del-Val plant.

On June 10, the regional director ordered an election to be held on July 1 at the Nylomatic plant. He defined two units: Unit A, covering production and maintenance employees, and Unit B, which covered the tool room employees. The election in Unit A only concerned the Ceramics Workers, but both the Ceramics Workers and the Tool Makers wanted to be the representative for Unit B.

On June 17, a vice president of the company informed vice president Bickerstaff of the decision to close Del-Val. The following day, Bickerstaff told Robert Worth, the operations manager for both Nylomatic and Del-Val, to start closing down

Del-Val.

Early in the morning of June 22, Nicholas Phillips, the labor relations manager of the employer, met with representatives of the Ceramics Workers and the Tool Makers to inform them of the decision to close Del-Val. When asked for a time table for the closing, Phillips said one had not yet been set. William Kline, a representative of the international of the Ceramics Workers, asked what could be done to help the employees. Kline replied: "There is nothing the [unions] can do." Later that day, Phillips met with the morning and afternoon shifts at Del-Val to announce the closing. Also on June 22, Worth posted notices at both Nylomatic and Del-Val announcing the closing.

The following day, June 23, Phillips again came to Del-Val to inform employees of the closing. At that time, outside the hearing of other employees, Phillips, Kline, and Long (the president of the Ceramics Workers local) met together. Kline said to Phillips that the Del-Val closing would affect the Nylomatic election set for July 1. Long testified that Phillips stated in response: "Yes it will. It will definitely have something to do with the vote."

The same day, Worth, who managed both plants, sent out a letter to all Nylomatic employees. After a brief opening paragraph, the letter continued:

> Yesterday I announced the decision by Midland-Ross to phase out the operations at the Del-Val plant. In 1975 Del-Val lost in excess of $500,000 and the trend has not improved. For the first five months of this year it has lost in excess of $240,000. While I personally regret this action, it will enable your management to concentrate solely on the survival of the Nylomatic operation.

The next four paragraphs continued by describing the financial conditions of Nylomatic and Worth's hopes that it would continue in its profitable activity. The letter then concluded:

> On July 1, 1976, you will be asked to exercise your right to vote for the Company or to vote for a third party to represent you. I urge you to give this decision your sincere, careful consideration. If you vote for the Company, we will continue to be able to resolve any problems that may come up without a third party coming between us.

Your management does not want a third party in the plant because a third party may create complex working conditions, we may have to hire unnecessary workers and we may have work stoppages, strikes or slowdowns. All of these have a negative effect on the profitability of our plant. You all know that you don't need a third party to continue getting good treatment at this plant.

Even if you signed a card you still have a right to vote "NO" in a secret ballot election...

NO TO DUES
NO TO STRIKES
NO TO VIOLENCE
NO TO THE ENCOURAGEMENT OF DISTRUST BETWEEN US

If we are to succeed in making Nylomatic a sound, profitable business which will give you security, we don't need the presence of a union — we need the utmost in trust, cooperation, and the spirit which you have exhibited in the past.

Sincerely yours,
Robert R. Worth
Operations Manager

June 29, two days before the election, Worth, Phillips, and sales manager Cal Engel spoke to the Nylomatic employees at three meetings, making the same remarks at each. Worth opened the meeting by announcing that Del-Val had been closed because it had become unprofitable. Phillips then told the employees that if they rejected the unions, they would profit when the plant profited. Finally, Engel explained that if the plant was organized, strikes would delay delivery of orders, and "a union would hurt the business."

June 30, Phillips met with representatives of the Ceramics Workers and the Tool Makers to discuss the Del-Val closing. When asked when the plant would close, Phillips replied that it would shut down for vacation on July 1 for two weeks, but he was unsure how many employees would be needed or for how long after vacation. After discussing insurance and vacation benefits, Phillips gave Kline of the Ceramics Workers a severance pay schedule. Kline disagreed with the proposal, and Phillips told him the employer's proposal was "not bargainable;

that's it. That's from the higherups."

July 1 saw the occurrence of two events. First, Del-Val closed for vacation and never reopened.[2] Second, at Nylomatic, the Ceramics Workers lost the election in Unit A, and the Tool Makers won the election in Unit B.

On July 6, the Ceramics Workers filed objections to the elections in both Units A and B. The same day, that union filed an unfair labor practice charge relating to the closing of Del-Val and its effect on the election. On July 7, the employer filed objections to the election in Unit B.

On August 4, Phillips and George Gardner, the employer's attorney, met with Kline and Long to discuss the effects of the closing. Phillips presented Kline with a proposed agreement that included the same severance pay schedule as that at the June 30 meeting. The agreement also recited that the "negotiations were conducted on a good faith basis." Kline objected to the good faith clause on the ground that it would prejudice the Ceramic Workers' pending unfair labor practice charge. An argument ensued, and Kline walked out of the meeting. Kline and Phillips later exchanged letters, but no more meetings were held.

On October 15, the elections in both Units A and B were set aside. The Ceramics Workers then filed a second unfair labor practice charge requesting a bargaining order as to Unit A. This was consolidated with the earlier charge and a hearing was held.

The ALJ found a variety of unfair labor practices: (1) the employer violated §§8(a)(5)&(1) of the National Labor Relations Act by failing to bargain with the Ceramics Workers over the decision to close Del-Val; (2) the employer violated §§8(a)(5)&(1) for not bargaining in good faith over the effects of the closing; (3) the employer violated §8(a)(1) by impliedly threatening the Nylomatic employees that it would close the plant if they voted for the unions; (4) the employer violated §§8(a)(3)&(1) by timing and implementing the closing of Del-Val in such a manner as to chill union activity at Nylomatic; and (5) the employer violated §§8(a)(5)&(1) by refusing to bargain with the Ceramics Workers as the collective bargaining

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2. Although some of the work, employees, and equipment at Del-Val was transferred to Nylomatic, there is no contention here that the closing constituted a runaway shop.

representative of Unit A at Nylomatic. In addition to a cease and desist order, the ALJ established preferential hiring lists and back pay for the Nylomatic employees and ordered the employer to bargain with the Ceramics Workers as to Unit A at Nylomatic. The Board adopted the ALJ's opinion with minor changes, and this appeal followed.

II. *Findings of Unfair Labor Practices*

A. *Bargaining About the Closing of Del-Val*

In *Brockway Motor Trucks v. NLRB,* 582 F.2d 720 (3d Cir. 1978), we established a framework for analyzing an employer's duty to bargain over the decision to close a plant in cases of a partial closing. Even where the employer's reason for closing is economic, "there is an initial presumption . . . that a partial closing is a mandatory subject of bargaining." *Id.* at 735. A balancing approach then is applied to determine whether a duty to bargain existed in a particular case, weighing the union's interest in protecting its members' livelihood against the employer's interest in implementing its economic decision with minimal interference or financial loss.

Here, we note that bargaining would have vindicated the union's interest. Even if the Ceramics Workers could not have helped to keep Del-Val open, it could have at least tried to make suggestions that would minimize the closing's effect on the employees, such as transfer of work, minimizing customer withdrawals, and so forth. *See id.* at 736.

By contrast, there is no suggestion that bargaining with the union would have hampered the employer's decision to close in any way. In *Brockway,* we refused to enforce the order because the economic considerations underlying the employer's decision were not in the record. Here, we have that reason: the unprofitability of the Del-Val plant. Yet there is nothing in all the evidence that Del-Val was so unprofitable that the employer had to close immediately without consulting the union. Indeed, the employer's conduct belies such a contention. Starting in January 1976, Bickerstaff spent over a month studying the problem. The task force then spent three months, and then the officer writing the PAR almost another two months. The employer has offered no reason why the union could not have

been notified at some point during this period. Indeed, the evidence shows that from January to June the employer considered many of the options that *Brockway* says the union can be helpful with. Nor is there any evidence that bargaining with the union would have harmed the employer's negotiations with some third party. *See id.* at 738-39.

In *Brockway,* we noted that if the closing was forced by a third party outside the employer's control, that might justify not bargaining with the union. The employer points out that most of its customers withdrew their orders after learning of the closing. Although withdrawal of orders might justify not bargaining in some situations, such is not the case here. The customers did not begin to withdraw orders until *after* the June 22 meeting at which the employer notified the union of its final, irrevocable decision. Thus customer withdrawals do not excuse the failure to involve the union between January and June 22. Because none of the economic factors present here overcomes the presumption in favor of the duty to bargain, we hold that the employer had a duty to bargain over its decision to close Del-Val.

Having found that a duty to bargain existed, we turn to the evidence relied on to support the finding that the duty was violated. We note initially that our scope of review as to factual findings is narrow: we may only reverse if the Board's finding is not supported by substantial evidence. It is for the Board to draw inferences and assess credibility, and we may not substitute our assessment of the evidence for the Board's if there are conflicting versions in the record. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

Here, there was ample evidence to support the ALJ's findings. Both Kline, the international representative, and Long, the local president, testified that the June 22 meeting was the first time either learned that the situation at Del-Val was so bad as to require closing.[3] Phillips, the employer's labor

3. The employer argues that Kline was aware of Del-Val's difficulty because there had been statements at bargaining sessions in previous years that Del-Val was having some problems. The ALJ could properly credit Kline and Long's statements for two reasons. First, there is no evidence that the statements indicated that the situation was so bad as to require a closing. Second, Kline, who had been involved in negotiations with other employers, testified that employers often alleged economic troubles as a bargaining lever and that such statements never meant to him that the employer would have to close.

management relations manager, would not give a time table nor did he ask for suggestions, conduct in which he persisted at the June 30 meeting.

Thus Phillips presented the union with a fait accompli and prevented it from participating in implementation of the timing of the closing, two of the situations the *Brockway* rule is designed to prevent. Accordingly, we hold that there was substantial evidence to support the finding that the employer violated its duty to bargain over the decision to close Del-Val.

B. *Bargaining Over the Effects of the Closing*

In addition to the duty to bargain over the decision to close, an employer has a duty to bargain over the effects of that closing on the employees. *See Brockway, supra,* at 736 & n.91; *NLRB v. Royal Plating & Polishing Co.,* 350 F.2d 191, 196 (3d Cir. 1965). Here, there was substantial evidence that the employer did not bargain in good faith.

Kline, the international representative of the Ceramics Workers, testified that on June 30, Phillips told him that the company's proposal on severance pay was not bargainable. The company presented the same proposal on August 4, along with a clause to the effect that the employer had bargained in good faith, which Kline read as an attempt to force the union to abandon its unfair labor practice charge. *Cf. United Steel Workers of America v. NLRB,* 401 F.2d 434, 438 (D.C. Cir. 1968) (it is an unfair labor practice to condition bargaining on the dropping of unfair labor practice charges), *cert. denied,* 395 U.S. 946 (1969). Long, who was present at both meetings, supported Kline's version. Finally, although the union wrote to the employer about further negotiations, the employer continued the request that the union sign the August 4 proposed agreement.

All of the employer's arguments on this point are not responsive to our scope of review. For example, it contends that Phillip's testimony contradicts that of Kline as to the June 22 meeting in that Phillips denied refusing to bargain and that he thought Kline was joking about severance pay. As to the August 4 meeting, the employer says that the presence of its lawyer indicates a willingness to bargain but that Kline "stormed out." Yet Kline testified that he felt that Phillips questioned his

credibility, which was the reason he left. The ALJ believed the testimony of Kline and Long over that of the employer's witnesses,[4] and as we have already noted, determinations of credibility are for the Board.

Because the testimony of the union's witnesses supports the ALJ's finding, we affirm the finding of a violation for failing to bargain in good faith over the effect of the closing of Del-Val.

C. *Implied Threats of Closing Nylomatic*

We have held that a threat to close a plant if the union wins the election may be an unfair labor practice. *E.g., NLRB v. Juniata Packing Co.*, 464 F.2d 153, 156 (3d Cir. 1972). The particular danger to be avoided is predictions not based on objective facts that tend to undermine the employees' ability to make a free choice. We have noted in this regard:

> However, language may *imply* a threat as well as constitute a threat directly, and the problem of drawing the line between a prediction and an implied threat is often one of great difficulty. As the economic dependence of employees on their employer may cause them to be particularly sensitive to nuances in language which would be lost on a neutral observer, the possibility that a statement contains an implied threat must be viewed from the employee's point of view. For that reason the expertise of the Board is particularly relevant to the determination of whether a latent threat lies hidden in the words of an employer. Our scope of review is limited to inquiry as to whether the Board's determination is reasonable and supported by substantial evidence.

Mon River Towing, Inc. v. NLRB, 421 F.2d 1, 9-10 (3d Cir. 1969) (footnotes omitted).

Here, the ALJ found three statements of the employer contained implied threats of closing Nylomatic: the notice posted at

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4. One of the counsel who represented the employer at the hearing testified as to the August 4 meeting. This put the ALJ in the unfortunate position of evaluating the credibility of one of the advocates before him. We note that such a situation should be avoided. ABA Code of Professional Responsibility EC 5-9, 5-10.

Nylomatic on June 22, the letter sent out by Worth, the operations manager, on June 23, and the meetings held by three company officials with employees on June 29.

Viewed from the employee's perspective the message was unmistakable. The June 23 letter starts out by saying that Del-Val (seven miles away and unionized) was being shut down because it had become unprofitable. The letter ends by saying that a union victory would make Nylomatic unprofitable. There is no objective reason given for this other than some rather vague generalizations about strikes and violence. Indeed, the preceeding paragraphs explain how profitable Nylomatic had been. The hidden connection between the opening and the closing, which few employees could miss, was that unionization of Nylomatic would lead to the same result as it had at Del-Val: unprofitability and subsequent closing.

The June 29 meeting followed the same pattern: Worth stating that Del-Val was being closed because it was unprofitable and Engel, the sales manager, warning that the union would hurt business at Nylomatic. Finally, the notices reinforced the message by their omnipresent reminder.

The employer offers two justifications for these activities. First, it claims it had to notify its landlord by June 30 that it would not renew its lease at Del-Val after December 31, 1976. The employer contends it did not want the employees to learn of the closing through rumours if it told the landlord. Although the employer did present testimony that the landlord was a local politician who might leak the news, the ALJ expressly discredited the testimony and found there was no danger that the landlord would tell anyone. Moreover, the record shows that the employer did not tell the landlord until June 30, the day before the election, and all the employer's conduct complained of by the union occurred prior to that date. Because the notice to the landlord was actually given right before the election and after the complained of conduct and because the ALJ found there was no likelihood that the landlord would leak the information in such a short space of time, the Board was justified in concluding that the employer's argument is without merit.

Second, the employer says it posted the notices at Nylomatic because some employees worked at both plants. In the first place, this does not explain why the employer in addition sent

out the letter and held meetings that involved all Nylomatic employees, even those who did not work at Del-Val. Moreover, given the ALJ's finding that the landlord would not tell anyone about the closing, the employer has offered absolutely no reason why anyone other than the landlord had to know about Del-Val prior to July 1.

We conclude that the finding of implied threats to close Nylomatic was supported by substantial evidence.

D. *Closing of Del-Val*

In *Textile Workers Union of American v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965), the Supreme Court held that although an employer may close an entire operation, it may not close one plant to chill unionism at another of its facilities. Here, the ALJ found, and all parties concede, that the employer eventually would have closed Del-Val because it was unprofitable. The employer now argues that once it is found that the decision to close is made on economic grounds, that is the end of the *Darlington* inquiry. The General Counsel argues, and the ALJ found, that the implementation and timing of the economic decision to close can be an unfair labor practice. We agree for two reasons.

First, such a rule can be derived from *Darlington* itself. The Supreme Court stated:

> [A] partial closing is an unfair labor practice under §8(a)(3) if motivated by a purpose of chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.

380 U.S. at 275.

The Court's emphasis on purpose and effect is significant. Normally, the proper moment of time at which an employer's motive is assessed is the time at which the alleged unfair labor practice is committed. *See. e.g., Great Chinese American Sewing Co. v. NLRB,* 578 F.2d 251, 255 (9th Cir. 1978) (per curiam) ("The fact that industry conditions may have changed after the closing, and might now provide a business justification for GCA's decision to subcontract abroad does not alter the fact that anti-Union animus motivated the closing and subcontrac-

ting when they occurred."). In addition, the effect of a person's actions normally is measured by looking at what the circumstances surrounding the action at the time it in fact occurred. Because the Court spoke in terms of purpose and effect, it would seem that the inquiry should focus on what the employer did in fact, which by necessity includes how the employer did it. In short, looking at the employer's decisionmaking process alone is not enough for a proper assessment of the *Darlington* factors. Both elements focused on in *Darlington* cannot be measured properly unless the manner in which the employer emplements its decision is carefully scrutinized.

Thus the employer's argument misreads the thrust of *Darlington* by saying that an economic decision is sufficient regardless of the chilling effect on unionism. The Supreme Court's emphasis on purpose and effect means the inquiry may not stop with the basis for the decision but must also consider the manner in which it is implemented. That the employer would have closed anyway in December 1976 in no way diminishes the fact that the employer's actions, when they occurred in June 1976, had the purpose and effect of chilling unionism.

Second, more generally we have often held that the timing and implementation of an otherwise valid economic decision may constitute an unfair labor practice, *E.g., Frito-Lay, Inc. v. NLRB,* 585 F.2d 62, 66 (3d Cir. 1978) (timing of previously planned wage increase manipulated to influence election); *NLRB v. Eagle Material Handling Co.,* 558 F.2d 160, 170 (3d Cir. 1977) (timing of layoffs). In addition, we have held that anti-union animus need not be the employer's sole motivation in a case of partial closing. *Id.* at 169-70. These two rules provide support for the proposition that valid economic reasons may not shield the employer where it has the additional motive, as shown by timing, of chilling unionism.

Here, there was substantial evidence of the employer's purpose and the effect of the timing of the Del-Val closing. The decision to close was made in a secretive manner, and then announced suddenly and widely right before the election. *Cf. General Teamsters & Allied Workers v. NLRB,* 427 F.2d 582, 586 (D.C. Cir. 1970) (timing of wage increase coupled with widespread publication of it). Phillips's statement to Kline that

the closing would affect the election show both the employer's purpose and that it knew the reasonably probable effect of the closing. The letters and meetings with the employees at Nylomatic, which constitute independent unfair labor practices, confirm this view of the employer's actions. As we have already noted, there was substantial evidence that the employer had no reason for telling the employees of the decision to close. A pattern of unfair labor practices often is used to show anti-union animus.

The employer argues that it had no choice but to close because customers withdrew their molds. We find this unpersuasive. The employer has offered no reason why it had to tell its customers prior to the election. Although one witness testified that the employer decided on June 18 to tell the customers immediately, he gave no explanation for this other than to say that the customers might not want to place orders with a plant that was closed. The employer well knew that customers might withdraw their molds, and the ALJ apparently believed that its hasty notice to them precipitated their withdrawal.

Indeed, the ALJ found that the employer had enough work to keep Del-Val open until the end of 1976. The employer disputes this finding, but it is supported by substantial evidence. The witnesses disagreed about how much work there was in June of 1976, and we cannot now substitute our judgment about which of them were correct.[5] In short, the evidence supports the theory that the employer precipitated the customer withdrawals and hastened the closing sooner than was economically justified. The employer may not now profit from its own conduct by claiming that the withdrawals of orders required a fast

5. For example, Long, the local president, testified that he saw the number of orders on a desk and was generally familiar with the workload at the plant. He then stated how many presses could have been run and for how long. His totals came to approximately six months.

closing.[6]

We hold that there was substantial evidence to support the finding that the employer timed and implemented the closing at Del-Val for the purpose of chilling unionism at Nylomatic.

III. *Remedy*

A. *Bargaining Order*

The Board may issue a bargaining order in one of two situations: in exceptional cases of outrageous and pervasive unfair labor practices (a *Gissel I* order), or where the unfair labor practices, though less pervasive, tend to undermine the union's majority strength and make a fair election unlikely (a *Gissel II* order). *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-15 (1969).

Here, the Board issued a *Gissel II* order. The ALJ first found that the Ceramics workers had 38 authorization cards, which the employer does not contest, which constituted a majority of the employers in Unit A, the production and maintenance unit. The ALJ then concluded that it "necessarily" followed from the nature of the unfair labor practices, especially the implied threats and the timing of the closing, that a fair election could not be held.

This reasoning is supported by substantial evidence. Some of the employees testified that the announcement of the closing affected their vote. Of those who denied it, it was for the ALJ to assess their demeanor. Indeed, a closing is the penultimate threat for an employee, and its psychological effect is a least as likely not to dissipate as other unfair labor practices we have held to justify a *Gissel II* order. *E.g., NLRB v. Daybreak Lodge*

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6. The evidence surrounding the start of the vacation and the election is ambiguous. One witness testified that the decision to go on vacation was made in January 1976. Yet this was the first time the employer shut down the entire Del-Val plant for vacation, and July 1 was a Thursday. In any event, even assuming that it was pure coincidence that the vacation started the same day as the election, there was substantial evidence that the employer capitalized on it. In the first place, the employer precipitated the withdrawal of customers' orders in a short space of time. Moreover, the employer would not state a time table for the closing despite union and individual employee requests. Thus on July 1, when the employees at Nylomatic went to vote, there was a general atmosphere of uncertainty as to whether Del-Val would ever reopen after the vacation to do more work.

Nursing & Convalescent Home, Inc., 585 F.2d 79 (3d Cir. 1978) (threat to fire employees if they vote for union); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164-68 (3d Cir 1977) (numerous violations, including solicitation of grievances, promises of future benefits, discharge of an employee, and threats to cancel some of the work).

Moreover, this case has all of the elements that we recently noted to be common where we have held a *Gissel II* order proper. *See Rapid Manufacturing Co. v. NLRB,* No. 79-1124, slip op. at 10-11 (3d Cir. Dec. 27, 1979). First, the implied threat was communicated to a "significant percentage of employees in the bargaining unit." Both the letter and the meetings involved every employee at Nylomatic. Second, the unfair labor practices involved senior company officials. They controlled the timing of the closing. The operations manager sent out the June 23 letter and posted the notices, and the June 29 meeting was run by him and the labor management relations manager and the sales manager. Finally, because the finding rests ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election.

The employer offers two reasons why we should not enforce this *Gissel II* order. First, it contends that although the Ceramics Workers had a majority in Unit A, it did not have one for the entire plant. The employer contends that the Board gerrymandered the units so that it could issue the bargaining order.

Initially, the regional director set the units on June 10, long before the employer told anyone of its decision to close Del-Val. We decline to say that the regional director had prescience that enabled him to anticipate the employer's conduct. Moreover, the Board has considerable discretion in setting the bargaining units, and we see no abuse of that discretion here. *E.g., NLRB v. Puritan Sportsware Corp.*, 385 F.2d 142 (3d Cir. 1967) (per curiam). Indeed, the very division of units at Nylomatic is the same as that at Del-Val and is quite common.

Second, the employer argues that the Board's orders as to Units A and B are inconsistent. The employer says that because the unfair labor practices made a free election impossible in Unit A, it must have had the same effect in Unit B. The employer claims that because the Board "permitted" a re-

election in Unit B, its *Gissel II* order as to Unit A is inconsistent.

Such an argument rests on a misperception of Board practice and rules. Although the mere fact that the union participates in an election and loses will not foreclose it from seeking a bargaining order in a subsequent unfair labor practice proceeding, *see Bernel Foam Products Co.*, 146 N.L.R.B. 1277 (1964), no bargaining order will issue unless the election has been set aside in a representation proceeding. *See Irving Air Chute*, 149 N.L.R.B. 627 (1964), *enforced*, 350 F.2d 176 (2d Cir. 1965). The theory behind this rule is that the absence of a valid, outstanding election justifies a bargaining order. *See Photobell Co.*, 158 N.L.R.B. 738 (1966).[7]

The crux of *Irving Air Chute* is that the union first must have the election set aside in a representation proceeding and then start an unfair labor practice proceeding to get a bargaining order. Indeed, in the representation proceeding here, the union tried to get a bargaining order. The regional director refused to consider the request, noting that the unfair labor practice proceeding was the proper forum for that claim. Thus, contrary to what the employer claims, the setting aside of the election in a representation proceeding does not express a view on way or the other as to whether a new election should be held or whether a bargaining order is more appropriate.

Here, the unfair labor practice charges filed by the union relate only to Unit A. At no time has the union asked for a bargaining order in Unit B. The Board did not hold that an election was possible in Unit B but not in Unit A. Instead, it merely set both elections aside in a representation proceeding and the union, for whatever reason, filed unfair labor practice charges relating only to Unit A. Although the Board has some latitude to expand the scope of the charge, it may not reach matters clearly not included in the scope of the complaint nor shown by the evidence at the hearing. *See generally Amax Coal Co. v. NLRB*, Nos. 78-2310, 78-2489, slip op. at 20-21 (3d Cir. Feb. 1, 1980).

In short, neither the representation proceeding nor the unfair

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7. We need not decide the correctness of the *Irving Air Chute* doctrine because the union here complied with all the procedural requirements of the Board's cases.

labor practice proceeding involved the appropriateness of a *Gissel II* order in Unit B. Thus the NLRB did not make inconsistent findings because it was never presented with the question of whether a free election could be held in Unit B.

We will inforce the *Gissel II* bargaining order here.

B. *Back Pay*

The employer argues that the Board's order of back pay to all Del-Val employees is improper because the employer negotiated an agreement with the Tool Makers as to the effects of the closing. We enforce this order for two reasons.

First, the back pay remedy is not designed to remedy a violation of §8(a)(5) for failure to bargain about the effect of the closing. It remedies the separate unfair labor practice of closing the plant in violation of §8(a)(3) for the purpose of chilling unionism at Nylomatic. The ALJ's order carefully distinguishes the remedies on this basis, limiting the §8(a)(5) remedies to the Ceramics Workers. We have already noted that there was substantial evidence that Del-Val would have stayed open until December 1976. Because the early closing harmed all the Del-Val employees and because any agreement as to severence pay with the Tool Makers would not remedy the lost pay due to the premature closing in violation of §8(a)(3), the remedial order was not an abuse of discretion.

Second, we have often held that remedial orders directed to non-parties are appropriate if fairly encompassed in the complaint and adequately proved at the hearing. *E.g, NLRB v. Midwest Transfer Co.*, 287 F.2d 443 (3d Cir. 1961) (back pay given to seven discharged employees proper even though only two filed charges). Here, by its very nature a closing affects every employee at a plant, and the evidence at the hearing was in no way limited to the effect of the closing on only the Ceramics Workers.[8]

8. This is in no way inconsistent with our previous statement that the charge acted as a limit on the Board's power to order a *Gissel II* order in Unit B at Nylomatic. The complaint merely mentions the closing of the entire Del-Val plant but limits itself to Unit A at Nylomatic. Moreover, the evidence at the hearing on Del-Val related to the entire plant, but the evidence as to Nylomatic was limited to Unit A. Indeed, no employoee in Unit B was either named (names were deleted from the list of card signers) or called to testify, and the general counsel's attorney stated that she was not presenting evidence as to Unit B. Thus neither the complaint nor the evidence put Unit B into issue.

We will enforce the Board's order of back pay to all employees at Del-Val.

Other Remedial Provisions of the Order

Finally, the employer claims that the Board improperly ordered preferential hiring lists and relocation expenses for Del-Val employees if the employer chose not to reopen the plant. I argues that this is forcing the employer to agree to contract terms over the effect of the closing in violation of *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). That case holds that where the employer violates its duty to bargain in good faith, the Board may not then set contract terms between the union and the employer.

We need not decide whether preferential hiring lists and relocation expenses would violate the *H.K. Porter* doctrine if they rested on the employer's refusal to bargain about the effects of the closing alone. *See generally NLRB v. W.R. Grace & Co.,* 571 F.2d 279, 283 (5th Cir. 1978). Here, these remedies serve to correct two unfair labor practices: both the failure to bargain over the effect of the closing, which violated §(a)(5), and the improper closing of Del-Val to chill unionism, which violated §8(a)(3). Thus there is more here than imposing contract terms for a violation of the duty to bargain, which was all that was involved in *H.K. Porter.* The additional violation of §8(a)(3) removes the case from the ambit of that doctrine because the remedy here is designed to restore, as much as possible, the situation prior to the closing, not to impose contract terms on the parties. *See generally Summit Tooling Co.,* 195 N.L.R.B. 479, 480-81 (1972), *enforced without opinion,* 474 F.2d 1352 (7th Cir. 1973). *See also Darlington Manufacturing Co. v. NLRB,* 397 F.2d 760, 773 (4th Cir.) (affirming without discussion), *cert. denied,* 393 U.S. 1023 (1968). We do not think it was an abuse of discretion to grant this remedy in the present §8(a)(3) context.

We will enforce the order of preferential hiring lists and relocation expenses.

IV.

We will deny the employer petition for review. We will enforce all portions of the Board's order.

WEIS, *Circuit Judge,* concurring and dissenting.

I concur with the result reached by the majority, except with respect to enforcement of the bargaining order.

The Board adopted the ALJ's finding that the company committed an unfair labor practice in disclosing to Nylomatic employees the decision to shut down the Del-Val facility. He conceded that the closing was brought about by economic conditions and that it was necessary to notify the landlord before June 30. Nevertheless, the ALJ believed that the company could have advised the landlord without also informing the Nylomatic employees before the July 1 election. At the same time, however, the ALJ concluded that the company violated its duty to bargain over the closing of the Del-Val plant.

It is inherently inconsistent for the Board to fault the company for not sooner releasing news of the planned shutdown of the Del-Val plant to the unions representing those employees and in the next breath to find that the employer was unfair in disclosing the same information to Nylomatic employees. Had the employer negotiated with the unions before closing the plant, discussions would have had to have taken place sufficiently in advance of June 30 to allow adequate time for effective action. During that period, rumors of the possible closing undoubtedly would have made their way to the Nylomatic plant. Such news travels fast and it is unrealistic to believe that it could have been kept secret, particularly since some employees worked at both plants.

Thus, if the company had complied with its duty to negotiate about Del-Val's shutdown, the employees at Nylomatic would have known before the election that closing the plant at Del-Val was under very serious consideration. It follows, therefore, that the Board is inconsistent in concluding that the company should have withheld information about that eventuality until after the election on July 1.

Moreover, I fail to see why it was undesirable for the Nylomatic employees to be fully aware of conditions at the

related plant before voting. Concealing information about the Del-Val closing would have amounted to nothing less than deception. One of the primary purposes of federal labor law is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." 29 U.S.C. §151. Interference with the dissemination of facts necessarily impinges upon an employee's exercise of choice by denying him the opportunity to be fully informed.

Underlying the Board's approach is a patronizing attitude toward the workers' ability to make an intelligent decision. The Board evidently doubts that the employees are mature adults who are entitled to relevant and truthful information useful in making a considered choice. To "protect" them, the agency apparently would spoon-feed only those matters that it deems safe for them to learn. I cannot agree with that philosophy or with the Board's finding that the failure of the company to conceal that the fact of the plant closing was an unfair labor practice.

Because I believe, however, that the voters should be given accurate information, I concur in the Board's determination that the letter sent by the company to Nylomatic employees discussing that plant's future was so exaggerated as to be deceptive. This "gloom and doom" report implied that the company was seriously concerned about Nylomatic's survival. Testimony of one of the company's vice-presidents, however, established that the Nylomatic plant was, in fact, highly profitable. Although the plastics industry had suffered a general downward trend the year before, there was no evidence suggesting that Midland-Ross was seriously considering the shutdown of Nylomatic.

The June 23 letter insinuating that the Nylomatic operation was on the brink of financial disaster and that the employees' decision to unionize could be crucial to survival was an unfair labor practice serious enough to require setting aside the election. In *Aircraft Radio Corp. v. NLRB,* 519 F.2d 590 (3d Cir. 1975), this court held that material misrepresentations should result in a new election. That ruling applies whether the misstatement is made by the union or management. In the case at bar, management should not be permitted to retain the possible benefits of its inaccurate representations.

That does not mean, however, that a bargaining order is justified. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), held that such orders are proper in instances where the Board determines that the unfair labor practice has a "tendency to undermine majority strength and empede the election processes." *Id.* at 614. The court clearly contemplated, however, that before issuing such an order, the Board would determine whether

> "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order...."

Id. at 614-15.

This court has shown particular sensitivity to the drastic character of *Gissel* bargaining orders by requiring specific Board findings that traditional remedies would not ensure a fair rerun election. In *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 1976), we said:

> "In light of the general and highly desirable practice in industrial relations of selecting bargaining representatives through traditional election processes, a rule requiring the Board to set forth a reasoned analysis justifying a bargaining order under *Gissel* is salutary."

Id. at 244. In a later case, the court reemphasized that "the Board is required to 'clearly explicate its reasons for issuing a bargaining order *and include findings as to why a fair election cannot be held.*' " *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1150 (3d Cir. 1977), *quoting NLRB v. Armcor Industries, Inc., supra* at 244 (emphasis added by *Hedstrom* court).

The rationale behind this court's holdings is clear: acceptance of Board "expertise" to support conclusory "boilerplate," without a reasoned analysis, does not comport with proper judicial review. Studies have cast doubts on the existence of such expertise, *see* Getman and Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972); Samoff, *N.L.R.B. Elections: Uncertainty and Certainty*, 117 U. PA. L.

REV. 228 (1968), and moreover, the subject matter is not so complex or ethereal that it cannot be understood by members of the third branch.

Routine issuance of bargaining orders after a review of the facts and a conclusory finding that the unfair labor practices were "egregious", "pervasive" or "chilling" is simp;y unacceptable.[1] Bargaining orders have been defended as a necessary sanction to deter misconduct by an overreaching employer,[2] but such orders do not affect the employer alone — they also fall on employees. It is they who lose the right to vote in favor of one union or another or none at all — rights that the National Labor Relations Act guarantees to them. Moreover, the Board's remedies should right the wrong — not act as punitive measures. *Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940).

In imposing bargaining orders, the Board is subordinating the employee's right to express his choice to its forecast as to who would have won the election if the employer had maintained laboratory conditions. When that prediction is little more than a guess, however, the Board's paternalism does not justify depriving the employees of their vote. The extreme response of a bargaining order should be the exception and not the norm — a principle recognized by this court in *Armcor* and *Hedstrom.*

The Court of Appeals for the Fourth Circuit commented on the problem in *NLRB v. Appletree Chevrolet, Inc.,* 608 F.2d 988 (4th Cir. 1979). The court found that the ALJ had recommended a bargaining order without considering the " 'residual impact' of [the unfair labor] practices, 'the likelihood of recurring misconduct' on the [company's] part, or 'the potential effect of ordinary remedies,' such as the issuance of an 8(a)(1) order." *Id.* at 997, *quoting Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1121 (7th Cir. 1973). Instead, the ALJ simply

1. Two commentators have charged that the Board has developed a chronic "knee jerk" reaction after *Gissel.* Without providing "any sure basis for determining when and under what circumstances a bargaining order will be granted" the Board has repeatedly and without explanation simply "played trump." Christensen & Christensen, *Gissel Packing* and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA, 37 U. CHI. L. REV. 411, 445-46 (1970).

2. *See,* Note, "After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?, 31 STAN. L.R. 505 (1979).

pronounced the "magic words 'pervasive and egregious' " before issuing the bargaining order. *Id.* Accordingly, the court properly refused to enforce the Board's order.

In the case at bar, the Board failed to show that the possibility of ensuring a fair rerun by the use of traditional remedies "is slight." *NLRB v. Gissel Packing Co., supra* at 614.[3] Although timing of the plant closing was said to have had a "chilling" effect on the workers, the Board did not attempt to explain why the majority in Unit A was undermined while that in Unit B survived and won the election. The same speeches were given and letters sent to both groups. Yet the employees in Unit A voted by a considerable margin[4] against the Ceramic Workers union while the workers in Unit B selected the Tool Makers as their representative. If the unfair letter of the company did not defeat the Tool Makers in this election, it seems highly unlikely that its influence was so pervasive or long-lived as to prevent a fair rerun election in Unit A. The fact that the Tool Makers local won its election and the Ceramic Workers local did not also raises the possibility that the employees were voting against that local specifically and preferred to be represented by some other union.

The Board failed to discuss the possibility of applying other less extreme corrective measures. The employer could have been required, for example, to send to each voter an accurate account of Nylomatic's financial posture and future prospects prepared by a competent, disinterested party. Such a disclosure would be very effective in correcting the misinformation circulated by the company without infringing on the employees' rights. Other remedies might be devised that would be directed to remedying the wrong and not penalizing the innocent bystanders — the employees. This is particularly true if the Board's order rests solely on the misleading letter and not the closing of the Del-Val plant.

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3. It has been noted that many unfair labor practices that appear coercive in fact have the opposite effect — they "may rally the voters against the employer instead of frightening them into submission." Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 41 (1964).

4. The vote was 37-28 against the union.

The record furnishes no support for the conclusion that a fair rerun election could not be held. Accordingly, I dissent from the majority's enforcement of the bargaining order.

APPENDIX B

OPINION AND JUDGMENT OF THE ADMINISTRATIVE AGENCY INVOLVED

Decision and Order
Of the National Labor Relations Board
In Board Case Nos. 4-CA-8081, 4-CA-8327

On April 24, 1978, Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in reply to Respondent's exceptions. Subsequently, Respondent filed a motion for oral argument.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.

The Administrative Law Judge ordered Respondent to pay all of the employees on the Del-Val payroll as of July 1, 1976, the amount each would have earned from July 1 to December 31, 1976, the date he found Respondent would have closed this

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1. Respondent's motion for oral argument is hereby denied because the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

2. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Chairman Fanning would find that Respondent's obligation to bargain with the Union over the Nylomatic employees arose on June 5, when the Union achieved majority support following its demand for recognition.

facility had it not been discriminatorily motivated. We agree that this backpay remedy is proper to remedy Respondent's 8(a)(3) violation, as all of these employees suffered such losses as a result of Respondent's action. However, we disagree with his recommended Order insofar as it awards interest on this backpay only from 5 days after the issuance of his Decision. We see no reason for this departure from the Board's normal backpay remedy in cases of discriminatory discharges. We shall therefore order that interest on such backpay begin as of July 1, 1976.

We also agree with the Administrative Law Judge that Respondent be ordered to bargain with the Union concerning its decision to close the Del-Val facility and the effects of such closing on the employees in the unit represented by the Union. However, under the present circumstances, such bargaining is likely to be only *pro forma* unless the Union can now bargain under the conditions which would have been present had Respondent bargained at the time the Act required it to do so. In order to recreate as nearly as possible the situation as it existed at the time Respondent should have bargained, including restoring to the Union some measure of economic strength, we shall order Respondent to pay its Del-Val employees who are represented by the Union, and who were employed as of July 1, 1976, amounts at the rate of their normal wages when last in Respondent's employ, from the date of this Decision until the occurrence of the earliest of the following conditions: (1) reaching mutual agreement with the Union relating to the subjects which Respondent is herein required to bargain about; (2) bargaining to a bona fide impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. Of course, if Respondent decides to resume its Del-Val operation and offers to reinstate the above employees to their same or substantially equivalent positions, its liability will cease as of that date. Backpay shall be based on the earnings which these employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB

289 (1950); *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344 (1953), with interest thereon computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB No. 117 (1977). See, generally, *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962).[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Electrical Products Division of Midland-Ross Corporation, Tullytown and Morrisville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as herein modified:

1. Delete paragraphs 2(d) through (f) and substitute the following:

"(d) Make whole all employees or former employees of the Del-Val facility who were on the payroll as of July 1, 1976, for any loss of pay suffered as a result of the discrimination against them on that date until December 31, 1976, the date on which the plant would have closed by fulfilling all of the customer orders and expiration of the lease, with interest thereon as set out in the Board's Decision. Place all the employees who were employed at the Del-Val facility on July 1 on a preferential hiring list separately for each of its other plants now in existence or hereinafter established in the continental United States, including the Nylomatic facility, with priority of employment on each such list to said employees in accordance with such system of seniority or other nondiscriminatory practices heretofore applied by Respondent in the conduct of its business and thereafter offer such employees reinstatement and employment

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3. See *Winn-Dixie Stores, Inc.*, 147 NLRB 788 (1964); *Royal Plating and Polishing Co., Inc.*, 160 NLRB 990 (1966).

As we are not ordering that the plant be reopened, we shall order that Respondent mail to all employees who are to be placed on the preferential hiring lists copies of the notice.

at each such plant in the manner set forth in the part of the Administrative Law Judge's Decision entitled 'The Remedy.'

"(e) Pay the Employees of the Del-Val facility who are represented by United Glass & Ceramic Workers of North America, AFL-CIO, CLC, their normal wages from the date of the Board's Decision and Order until the earliest of the conditions set forth in the Board Decision are met.

"(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

"(g) Post at all its facilities throughout the United States, including the Nylomatic facility in Morrisville, Pennsylvania, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to Respondent are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

"(h) Mail to the last known addresses of all employees on the hiring lists copies of the attached notice, on forms provided by the Regional Director for Region 4, after such notices have been signed by authorized representatives of Respondent.

"(i) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. November 17, 1978

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT threaten our employees at the Nylomatic facility with plant closure if they support the Union by posting notices at the Nylomatic facility announcing the closure of other Midland-Ross facilities.

WE WILL NOT threaten our employees at the Nylomatic facility with plant closure if they support the Union by mailing letters to the Nylomatic employees informing them of the closure of our Del-Val facility, or any other Midland-Ross facility, or any other Midland-Ross facility, or warning employees of the negative effect that unionization would have on the Nylomatic plant's profitability.

WE WILL NOT threaten our employees at the Nylomatic facility with plant closure if they support the Union by orally informing employees of the phaseout of the Del-Val facility and other Midland-Ross plant closures.

WE WILL NOT time and implement a plant closure at any of our plants for the purpose of discouraging membership in, sympathy for, or activities on behalf of the Union, or any other labor organization.

WE WILL NOT discourage membership in United Glass and Ceramic Workers of North America, AFL-CIO, CLC, or any other labor organization of our employees, by discriminating in regard to hire, tenure, or any other term or condition of employment.

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive bargaining representative of all of our employees in the appropriate unit at the Del-Val facility concerning our decision to close the Del-Val facility.

WE WILL NOT fail or refuse to bargain in good faith with the Union as the exclusive bargaining representative of all of our employees in the appropriate unit at the Del-Val facility about the effects of the closing of that facility on our Del-Val

employees.

WE WILL NOT fail or refuse to recognize and bargain with the Union as the exclusive bargaining representative of our employees in the appropriate unit at the Nylomatic facility.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL, upon request, recognize and bargain with the Union as the exclusive representative of all employees in the unit at the Del-Val facility concerning our decision to close the Del-Val plant.

WE WILL, upon request, recognize and bargain with the Union as the exclusive representative of the employees in the unit at the Del-Val facility concerning the effects of the closing of the Del-Val facility on the Del-Val employees.

WE WILL, upon request, recognize and bargain with the Union as the exclusive representative of the employee in the appropriate unit at the Nylomatic facility.

WE WILL make whole all employees or former employees of the Del-Val facility who were on the payroll as of July 1, 1976, for any loss of pay suffered as a result of the discrimination against them on that date until December 31, 1976, the date on which the plant would have been closed by fulfilling all of the customer orders and expiration of the lease, with interest thereon.

WE WILL pay the employees of the Del-Val facility who are represented by United Glass & Ceramics Workers of North America, AFL-CIO, CLC, their normal wages for the period required by the Decision and Order of the National Labor Relations Board.

WE WILL place all of the employees who were employed at the Del-Val facility on July 1, 1976, on a preferential hiring list, separately for each of our plants now in existence or hereinafter established in the Continental United States, including the Nylomatic facility, with priority of employment on each such list to said employees in accordance with such sustem of seniority or other nondiscriminatory practice heretofore applied by us in the conduct of our business, and thereafter offer such employees reinstatement and employment at each such plant.

ELECTRICAL PRODUCTS DIVISION
OF MIDLAND-ROSS CORPORATION

_____

(Employer)

Dated_____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr. Federal Building, 600 Arch Street, Room 4400, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Statement of the Case

JAMES T. YOUNGBLOOD, Administrative Law Judge: These cases were tried before me in Philadelphia, Pennsylvania on March 8, 9, 10, and 11, and April 5 and 6, 1977 pursuant to consolidated complaints issued by the General Counsel of the National Labor Relations Board and answers thereto by Electrical Products Division of Midland-Ross Corporation (herein Respondent or Midland-Ross). At issue in this proceeding is whether the Respondent violated Section 8(a)(5) in that it refused to bargain about the closing of one of its facilities and whether it refused to bargain in good faith about the effects of that closing; whether the timing and implementation of that closing was designed to chill unionism at another plant in violation of Section 8(a) and (1) of the Act; and whether this conduct so impeded the holding of a second election that a *Gissel*

bargaining order is appropriate. Respondent denies the commission of any unfair labor practices. Briefs were filed by all parties and they have been duly considered.

Upon consideration of the entire record made in this proceeding, including the briefs submitted to me, and upon my observations and the demeanor of each witness while testifying, I hereby make the following:

Findings of Fact and Conclusions

I. *The Business of Respondent*

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Ohio. Respondent has been engaged in the manufacture of molded plastic components at facilities located in Tullytown, Pennsylvania (herein called the Del-Val plant), and in Morrisville, Pennsylvania (herein called the Nylomatic plant). During the past year, Respondent has shipped goods valued in excess of $50,000 from its Pennsylvania facilities directly to customers located in states of the United States other than the Commonwealth of Pennsylvania.

The Consolidated Complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

The Respondent admits, and I find, that United Glass & Ceramics Workers of North America, AFL-CIO, CLC is a labor organization within meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

The Midland-Ross Corporation is engaged in the manufacture of various products from its numerous facilities located throughout the United States. The Company had some 28 plants located throughout the United States including the Del-Val plant and the Nylomatic plant in Pennsylvania with which we are primarily concerned. The Del-Val and Nylomatic facilities were purchased by Midland-Ross in 1974.

With the exception of the Nylomatic plant all of the Respon-

dent's plants and facilities throughout the United States were organized and represented by some union. It appears from the record herein that from the inception the Del-Val facility was losing money, and the Company considered disposing of this facility as early as 1974. It is undisputed that the Del-Val plant was a losing proposition.

The Union has been the representative for the purpose of collective bargaining of all production and maintenance employees including shipping and receiving employees, janitors and truck drivers at Respondent's Del-Val plant but excluding all employees in the bargaining unit for which the Tool Makers are certified, and all office clerical employees, lab technicians, technical employees, professional employees, guards and supervisors as defined in the Act. The International Union of Tool, Die and Mold Makers, a/w American Craftsman Association (herein called the Tool Makers) has been the bargaining representative for the toolroom employees, including toolroom clericals, at the Del-Val plant. As indicated, the employees at the Nylomatic facility in Morrisville, Pennsylvania were unrepresented.

The Nylomatic and Del-Val facilities were part of the Electrical Products Division, a division of the Electrical Products Group. The Electrical Products Group has other plants located in Pittsburgh, Pennsylvania, Athens, Tennessee and Livingston, New Jersey. In January 1976,[1] Nylomatic, Del-Val and the employer's Livingston facility were put under the supervision and control of Mr. George W. Bickerstaff. Mr. Robert Worth was placed in the position of operations manager for the Nylomatic and Del-Val plants. These two plants were located only 7 miles apart. Mr. Worth along with other managerial personnel shuttled back and forth between the two facilities. One sales department, one personnel department and one purchasing department served both plants. All accounting records were located at the Nylomatic facility, as well as the sales, purchasing and personnel offices. The Nylomatic and Del-Val facilities along with another facility in Trenton, New Jersey, were acquired by Midland-Ross in April of 1974. They were acquired from the same individual. The Trenton facility, being un-

1. Unless otherwise specified all dates refer to 1976.

profitable, was closed immediately. The Del-Val and Nylomatic operations were both engaged in the manufacture of plastic parts.

As indicated, for many years the Union represented a unit of production and maintenance employees at the Del-Val facility. In March, the Union began an organizing campaign at the Nylomatic facility. Roy T. Albert, the union representative in charge of the organizational campaign, stated that the campaign began on March 1, with the mailing of a letter to the Nylomatic employees, comparing the various benefits of the Nylomatic employees with those of the Del-Val organized employees. The letter concluded by stating:

> Enclosed is a card that is required by law for us to petition the government for a National Labor Relations Board supervised secret ballot election. *These cards are absolutely confidential:* No member of management or any other worker will know who filled out cards.
>
> If you want to move ahead and insure your job security by a signed legal written union contract, then do your part and fill out the enclosed card and mail in the postage free envelope. Don't delay. Do it today.

The letter was signed by William Chuck Kline, International representative of the Union and the letter also contained a standard union authorization card.[2]

Albert testified that the response from the employees was most gratifying and this prompted them to send another letter to the employees thanking them for their response and enclosing another card if they had not already returned theirs.[3] The letter is undated but from its language is appears that it was mailed on

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2. The card states:

   OFFICIAL MEMBERSHIP APPLICATION AND AUTHORIZATION

   I, hereby apply for membership in the United Glass and Ceramic Workers of North America, AFL-CIO, CLC. I hereby designate and authorize the United Glass and Ceramic Workers of North American, AFL-CIO, CLC as my collective bargaining representative in all matters pertaining to wages, rates of pay and other conditions of employment. I also authorize the United Glass and Ceramic Workers of North America, AFL-CIO, CLC, to request recognition from my employer as my bargaining agent.

3. This letter is General Counsel's Exhibit 55.

March 11, the day the Union filed its representation petition with the Regional Office in Philadelphia. Along with the petition the Union sent in 32 authorization cards signed by the Nylomatic employees with a list of those employees, and in turn received a receipt from the Regional Office in Philadelphia. On March 19, the Union mailed to the Board an additional 10 authorization cards along with a list of those employees; and on June 28, the Union forwarded 4 additional authorization cards, making a total of 46 authorization cards which were placed in the hands of the Regional Office where they stayed until the hearing in this matter.

On March 10, the Union informed the Respondent that it represented a majority of the production and maintenance department employees including the toolmakers, and shipping and receiving employees employed at the Nylomatic facility and requested recognition and negotiations. By letter of March 12, Midland-Ross responded informing the Union that it doubted the Union represented an uncoerced majority in an appropriate bargaining unit and they saw no point in meeting with the Union at that time.

On March 25, the Tool Makers filed a representation petition, Case No. 4-RC-12082 seeking to represent a unit of all tool, die, moldmakers, machinist, apprentices and allied toolroom craftsmen, at the Nylomatic facility. The petition stated that the unit contained 10 employees.

On June 10, the Regional Director for Region 4 issued his Decision and Direction of Election. In the Decision and Direction of election, the Regional Director set up two separate units. Unit A, as it is called, sets up a unit consisting of the production and maintenance employees including shipping and receiving employees, production control clerks, and mold maintenance employees at the employer's Morrisville, Pennsylvania plant. Unit B, consists, of all toolroom employees including toolroom clericals at the employer's Morrisville plant. On June 22, the Regional Director issued an amendment to the Decision and Direction of Election correcting an inadvertent error in the original Decision and Direction of Election and directed that those eligible in Unit A shall vote whether or not they desire to be represented by the Union and those eligible in Unit B, shall

vote whether or not they desire to be represented by the Tool Makers. Thus, there were two units set up with the eligible employees being able to vote only for one union in each of the two units. The employer sought review of the Director's decision and, the Board amended the Direction of Election to provide for a self-determination election among the tooling department employees as is the Board's normal procedure in the circumstances here. See *Precision Cast Parts Corp.*, 224 NLRB 382. Thus, the employees in Unit B were given the option to decide whether they wanted to be represented in that unit by the Tool Makers, or whether they desired to be represented by the Union. The election was scheduled for July 1.

As counsel for the General Counsel appropriately put it in her brief, that while the unions were gearing up for the election at the Nylomatic facility, management was crystalizing its plans for the closing down of the Del-Val operation. As indicated previously, since acquiring the Del-Val facility in 1974 Respondent had been concerned about its profitability. As a result the Respondent had a firm by the name of McKinsey & Company do a market analysis of all Midland-Ross' operations and that firm recommended that Midland-Ross divest itself of Del-Val. Despite this recommendation and heavy losses, Midland-Ross continued to operate the Del-Val facility.

It is undisputed that in February, prior to the Union's organizational campaign at Nylomatic, a so-called task force was assigned to evaluate management's various options to eliminate the severe losses at Del-Val. When the task force met again in April, after the advent of the Union at Nylomatic, a decision was reached to prepare a Project Appropriations Request (herein called PAR). PAR's are prepared for any investment exceeding $100,000 and is an analysis of the cost and benefits of a particular corporate expenditure. As the closing of a facility and the moving of machinery obviously involved a great deal of expense this necessitated the preparation of a PAR. It is fair to say that at the time management ordered the PAR it was virtually certain that the Del-Val facility could not be turned into a profitable operation. It was the recommendation of Louis Zahradnik, the division comptroller, after preparing the PAR, and based on available data, that they close the Del-Val facility and move certain of the machinery to the

Nylomatic facility.

On June 4, Zahradnik submitted the PAR to management. William H. Satterfield, group vice president, gave his approval to the PAR on June 4, and circulated it throughout the corporate hierarchy for approval by the executive committee. On June 17, prior to final approval on the PAR, Satterfield notified George Bickerstaff that he had received assurances from the top corporate officials that approval was forthcoming and that Bickerstaff should begin taking the necessary steps to close down Del-Val. On June 18, Bickerstaff informed Labor Relations Manager Nicholas Phillips that the PAR had been approved, and assigned Robert Worth, the operations manager, the task of shutting the plant down.

There is some evidence that the Union was aware that the Del-Val facility was unprofitable and in financial difficulties. However, there is nothing in this record to indicate that at any time prior to June 21, that the Respondent indicated, informed or otherwise notified the Union that it was considering closing the Del-Val facility. On June 21, Phillips contacted Kline, and Schickling of the Tool Makers and requested that they meet him the next day at the Bristol Motor Inn. On June 22, Phillips and Parks, from Midland-Ross, met with Kline and Schickling as requested. Phillips stated that he opened the meeting by informing those gathered that due to the continuing deterioration of the economic problems at Del-Val, the Company had decided to close the plant and he felt they should get together with the committees and negotiate the closing of the plant and its effects, and to answer any questions. Phillips stated that he opened the meeting by informing those gathered that due to the continuing deterioration of the economic problems at Del-Val, the Company had decided to close the plant and he felt they should get together with the committees and negotiate the closing of the plant and its effects, and to answer any questions. Phillips stated that Kline completely disagreed with what he was saying, and said the Company was only trying to scare the employees at Nylomatic; that the Company was not serious and he was going to file unfair labor practice charges. Phillips then suggested that they get together at the plant to meet with the two union committees so that they could advise the committees

simultaneously. According to Kline, Phillips said, "We are going to phase out the Del-Val, Tullytown plant." Kline told Phillips that this was a shock and what is the problem; that nobody had told the Union anything about this. Phillips said they were having losses. Kline said he told Phillips that he knew the election was going on at Nylomatic, and he disagreed with what the Company was doing and charges would be filed. Kline stated that he was never asked by anybody if the Union had any suggestions for saving the plant. He said that Phillips merely informed them that the corporate decision had been made. When Kline, in fact, asked what his Union could do to save its members, Phillips replied, "There is nothing we can do." Although Phillips stated that the plant was closing because of its financial losses he did not provide any financial data on the amount of the loss.

There is little doubt that the decision to close the plant was final and not negotiable. In fact, Mr. Bickerstaff testified that the decision to close the plant had been made and it was final, and that when he informed Worth to close the plant he was not asking him for any further facts or figures but that he was closing the plant and for him to phase it out.

Following the meeting at the Bristol Motor Inn the union and management representatives went to the Del-Val facility where they met with the unions' negotiating committees. Phillips repeated the news of the phaseout and shutdown to the unions' negotiating committees. Following this the day shift employees were called together in three separate groups and informed of the decision to close the facility. At that time the employees were informed by Phillips that there would be severance pay if there was no sabotage or equipment damage. Similar meetings were held with the employees on the second and third shifts. At none of these meetings did Phillips give any timetable as to the proposed shutdown. Chuck Kline testified that prior to the meeting with the third shift on the morning of the 23rd he mentioned to Phillips that this closing was going to have a bearing on the election at the Nylomatic facility to which Phillips replied, "It's going to have an influence on it." On June 22, the Respondent posted a notice on the bulletin board at the Del-Val facility informing the employees of the phase out of the Del-Val facility. The notice also informed the employees that the Com-

pany was currently notifying the employees, the union and their customers of this decision.

On June 22 the Respondent posted the notice, referred to above, at the Nylomatic plant. This notice was not, however, posted at any other Midland-Ross facility, except Del-Val. On June 23 the Respondent also mailed a letter to each of the Nylomatic employees detailing the financial losses of Del-Val and enumerating various factors such as third party interference which would hinder Nylomatic's profitability.[4]

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4. This letter was Joint Exhibit 5 and reads as follows:

June 23, 1976

Dear Fellow Employee:

I have had the opportunity in the past few months to communicate to some of you on the state of business conditions in our plant. In order to insure that all of you and your families have this very important information, I am writing to you personally.

Yesterday, I announced the decision by Midland-Ross to phase out operations at the Del-Val plant. In 1975, Del-Val lost in excess of $500,000 and the trend has not improved. For the first five months of this year it has lost in excess of $240,000. While I personally regret this action, it will enable your management to concentrate solely on the survival of the Nylomatic operation.

In 1975, Nylomatic lost in excess of $250,000. For the first five months of 1976, we have apparently reversed the trend through our joint efforts and are now beginning to show a slight profit. As I pointed out to many of you, each Midland-Ross plant must be able to stand on its own as a viable unit. Increased wages and benefits are available only when earnings are there to justify them. For your information, the latest wage increases alone on an annualized basis cost the Nylomatic plant in excess of $70,000. I'm sure you all are aware that Nylomatic has the second highest wage rate for plastic molding operations in the Delaware Valley area. With the phasing out of the Del-Val operation, Nylomatic will have the highest rates in the area. Under Midland-Ross, wages have increased dramatically, additional holidays have been granted, bereavement and health insurance benefits improved.

Several of you have heard me mention my plans for the future of Nylomatic. As noted in the 1975 annual report, Midland-Ross corporate strategy has resulted from the most intensive study ever made of its products and market. It is based on concentrating out resources and development efforts in four areas, electrical products, high technology, capital equipment, steel castings and mechanical controls. The corporate plan is to aggressively expand its activities in these areas through broadened product development programs and where appropriate, by suitable acquisitions.

The former Engineered Plastics Division of the company was in-

On June 29, 2 days before the election, Respondent held meetings with all three shifts of the Nylomatic employees and again reminded these employees of the closing of the Del-Val facility and again urged the employees to vote against the Union. On June 30, a meeting was held between the unions and management to discuss the effects of the closing of the Del-Val facility. At this meeting Phillips informed the union representatives that after the vacation shutdown which would be July 1 until July 19, Respondent would need 12 to 15 employees in the

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tegrated with the Electrical Products Division as one of the first steps in the new corporate strategy. The logic of the initial move stems from the fact that most of the customers for the molded plastic components we produce are in the electrical and electronics industries. It will also promote the application of considerably more plastics technology to the development of new electrical products for current and future Midland-Ross requirements.

We have realigned the sales efforts by bringing Cal Engle back into the Nylomatic operation to concentrate on developing new accounts and rejuvenating some of our older ones. We have extremely close ties with other Electrical Products Division plants through the efforts of Mushtaq Punjani and myself. We are determined to accomplish our objective of putting Nylomatic on a profitable basis. To do so, we also need your cooperation.

On July 1, 1976, you will be asked to exercise your right to vote for the Company or to vote for a third party to represent you. I urge you to give this decision your sincere, careful consideration. If you vote for the Company, we will continue to be able to resolve any problems that may come up without a third party coming between us.

Your management does not want a third party in the plant because a third party may create complex working conditions, we may have to hire unneccessary workers and we may have work stoppages, strikes or slowdowns. All of these have a negative effect on the profitability of our plant. You all know that you don't need a third party to continue getting good treatment at this plant.

Even if you signed a card you will have the right to vote "NO" in a secret ballot election...

NO TO DUES

NO TO STRIKES

NO TO VIOLENCE

NO TO THE ENCOURAGEMENT OF DISTRUST BETWEEN US

If we are to succeed in making Nylomatic a sound, profitable business which will give you security, we don't need the presence of a union — we need the utmost in trust, cooperation, and the spirit which you have exhibited in the past.

production and maintenance unit and two employees in the tool and die unit and one apprentice in the tool shop. The issue of severance pay came up first, Phillips requested that they put severance pay aside and dispose of some of the other issues that had been brought up by the unions. The unions were told to bring up anything they wanted to discuss. The unions and the Respondent did come to agreement on a pro rata vacation plan and on the continuing provision of group insurance benefits. Phillips left the room and made a handwritten document encompassing the proposals which had been agreed on, and what the Company thought would be a fair and equitable severance pay schedule.[5] Phillips handed a copy of the severance pay schedule to Kline, and after Kline had examined the paper, he informed Phillips that he disagreed with whatever is going on, and stated that the Union had filed charges, but he said, "Why don't you double this for the employees. They've been good employees and good producers. We've never had any problems, we've never had a strike, we never had an arbitration case." According to Kline, Phillips responded that that issue was not bargainable, advising, "This is it, it's from the higher ups." Richard Strauss who attended this June 30 meeting, and who was at that time the tool manager of Nylomatic and Del-Val tool shops, testified that Kline did request Phillips to double the amount but, in his view, Kline said this in a joking manner and was only kidding.[6] Shortly thereafter the June 30 meeting broke up.

The election was held on July 1, and ironically this was the last day the employees worked at the Del-Val plant. When the employees went on vacation they never returned, because the plant never reopened. The tally of ballots in Unit A shows that the approximate number of eligible voters was 68. Twenty-eight votes were cast for the Union, and 37 votes were cast against the Union. In Unit B the toolroom employees selected the Tool Makers as their representative. Objections to the conduct of the elections were filed by both the Respondent and the Union and

5. This document is General Counsel's Exhibit No. 7.

6. I have carefully read this transcript dealing with the testimony of Mr. Kline and I personally observed Mr. Kline in the courtroom and I know that this was not a joking matter to Kline. It is my conclusion that Kline did request Phillips to double the amount as a counterproposal and Phillips replied that it was not bargainable; that higher-ups had given this amount and that is it.

the elections in the production and maintenance unit and the tool unit were set aside.[7]

After July 1, there was no further production as the Del-Val facility. Much of the Del-Val equipment was sold and some of it was moved to the Nylomatic plant where it continued to produce various products which had previously been manufactured in the Del-Val facility. In fact, of the 12 transfer presses at the Del-Val facility 6 were moved to the Nylomatic plant, and of the 18 injection presses, 4 were moved to the Nylomatic plant. Additionally one wheelobrator, one pillmaker, one supersonic wash, one sandblast and two drill presses were also moved to the Nylomatic facility, where they were phased into the production at the Nylomatic plant.

On August 3, the Company met with the Tool Makers to discuss the effects of the closing. Apparently they came to terms, and the Tool Makers were satisfied and signed a so-called memorandum of agreement. On August 4, the Company met once more with the Union to discuss the effects of the closing of the Del-Val facility on the Del-Val employees. At this meeting the Company contingent included company counsel George Gardner. Gardner was introduced to the assemblage, and Mr. Phillips presented Mr. Kline with a memorandum of agreement.[8] This memorandum covers the two items agreed upon, that is, the group insurance continuation and the pro rata

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7. In its answer the Respondent argues that the objections to the election filed by the Union were untimely and therefore there cannot be any type of a *Gissel* remedy entered in this case because no objections were in fact filed. The objections to the election are not before me. The Acting Regional Director ruled upon the objections to the election, apparently finding them timely. The Respondent's recourse, if any, was the filing of exceptions with the Board.

8. This memorandum of agreement is designated as Respondent's Exhibit No. 2. The original document submitted in evidence at the hearing was an unsigned document. On June 25, 1977 after the hearing the Respondent made a motion to substitute a signed copy of its Exhibit No. 2 and asked that it be substituted or in the alternative be added as an additional exhibit. The Respondent advised that this document was furnished by the General Counsel after the hearing and constitutes evidence which was unavailable to them at the hearing. There being no objection to this substitution I will substitute the copy signed by William Kline, Kenneth W. Long, and Delores Crawford for the unsigned document which was put in at the hearing. This document will be marked as Respondent's Exhibit No. 2.

vacation pay. In addition it included the severance pay schedule and contained the following paragraph:

> The parties agree that during the negotiations with respect to the phaseout and closedown of the Del Val plant, each party had the opportunity to make proposals with respect to any subject or matter it wished embodied in this memorandum of agreement, that negotiations were conducted on a good faith basis, that the understandings and agreements arrived at by the parties after the exercise of that opportunity are set forth herein.

After reading the document Kline advised the Respondent that he opposed that clause and stated that he was not going to sign the agreement because it relieved the Company of all responsibility for the unfair labor practices.[9] Kline reminded Phillips that he told them on June 22 or 23 that there would be severance pay if there was no sabotage or equipment damage. Kline then complained that getting the severance pay was now conditioned upon his signing this memorandum of agreement, in which case he would be agreeing that the Company had bargained in good faith. This precipitated a heated argument between Kline and Phillips, and Phillips told Kline that his credibility left something to be desired. Although the memorandum of agreement appears to have been signed by Kline at some point, it was made clear by Kline at the meeting that he could not accept the memorandum of agreement until he got approval from his attorney. And apparently that approval was never granted.

On August 13, in response to a letter of August 6, from Kline relative to severance pay, Respondent forwarded a letter to the Union ostensibly offering to meet and negotiate if they had anything further to negotiate.[10] Kline acknowledged that he had received this letter but he does not recall its text.[11] In any event,

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9. On July 6, 1976 the Union filed 8(a)(1), (3) and (5) charges against Respondent.

10. By this time the Union had filed the charge on which this proceeding is predicated.

11. In this letter Respondent acknowledged that there was no sabotage or damage at the plant, although during the hearing certain of Respondent's witnesses testified to the contrary.

in subsequent conversations between Kline and Phillips it was made clear that Kline could not accept any memorandum of agreement until he got the approval of his attorney and his attorney had not given such approval.

Discussions and Conclusions

In *Textile Workers v. Darlington Co.,* 380 U.S. 263 (1965), the Supreme Court held that an employer had an absolute right to terminate his entire business for any reason he pleases. And that when an employer closes his entire business, even if it is motivated by vindictiveness towards a union, such action is not an unfair labor practice. Thus, it is clear that where an employer decides to terminate his business entirely, his decision to close the business cannot be an unfair labor practice and therefore he does not have to bargain about the decision to close the entire business. However, in situations where the employer is under no obligation to bargain with the union about the decision to go out of business entirely he must nevertheless bargain with the union about the effects of the closing on the employees involved. See *N.L.R.B. v. Royal Plating & Publishing Co.,* 350 F. 2d 191, 196 (3rd Cir. 1965). On the other hand, the employer who partially goes out of business must bargain with the union about the very decision to close the plant as well as the effects of the closing on the employees. See *Summit Tooling Co.,* 195 NLRB 479 and *Ozark Trailers Inc.,* 161 NLRB 561.

Here, Midland-Ross operated some 28 plants. At least five of these were within the same division and involved in making similar products. The Del-Val and Nylomatic facilities were particularly involved in making similar products in that much of the machinery involved in the Del-Val facility was transferred to the Nylomatic plant. There is no question but Midland-Ross is still in business, and is still in the business of making the same or similar products that it was making at the Del-Val facility. It is obvious that Midland-Ross did not go completely out of business. It is also obvious that it did not go completely out of the business in manufacturing products similar to those it manufactured at the Del-Val facility. Thus, it is my conclusion that this was a partial closing, as that involved in *Ozark Trailers,* and that the Respondent was under a duty to bargain

with the Union about its decision to close the Del-Val facility as well as the effects of that closing upon the employees involved.

The complaint alleges that since on or about June 17, and continuing to date Respondent has refused, and continues to refuse, to negotiate with the Union about its decision to shut down or phase out the Del-Val operation. In my view this issue requires very little discussion, for it is clear in this record that when the Union was finally notified of the Respondent's decision to close the plant, the decision to close was final. In fact, George Bickerstaff testified that when he informed Phillips of the closing there was nothing to be discussed, the decision was final. Kline testified that when Phillips notified him of the closing he asked if there was anything they could discuss. Phillips said, "Nothing." Respondent was well aware at least in April that it was considering closing down or phasing out the Del-Val facility. In fact, in February the Respondent began gathering material and facts to determine the future of the Del-Val facility. In April when top management realized that there were serious questions as to whether Del-Val could ever be a profitable enterprise, it started the preparation of a PAR. The PAR confirmed the obvious, that is, that the Del-Val facility could never be a profitable enterprise. Thus, on June 4, Satterfield approved the recommendation of the PAR and submitted it for corporate approval. The recommendation of the PAR, as indicated previously, was for Midland-Ross to divest itself of the Del-Val facility and transfer certain of the machinery to the Nylomatic facility. On June 17 Satterfield informed Bickerstaff of the closing; that the PAR would be approved by corporate and authorized him to take the necessary steps to close the facility. Even on this date the Respondent did not notify the Union of the impending closing of the Del-Val facility. It was not until the meeting between Phillips and Kline at the Bristol Motor Inn that the Union was first notified of the closing of the facility. At this point is was *a fait accompli,* and as Phillips said there was nothing that could be done. It is therefore my conclusion that Respondent unilaterally decided to close this facility and refused to bargain with the Union about this decision to close the facility in violation of Section 8(a)(5) of the Act.

The Complaint also alleges that Respondent bargained in bad faith with the Union concerning the effects of the closing of this

facility. The record reflects that the parties met on two occasions to discuss the effects of the closing, June 30 and August 4. At the June 30 meeting Kline credibly testified, and he was supported by Ken Long, that they met with Phillips and agreed upon pro rata vacation and group insurance benefits. Thereafter, Phillips left the room and when he returned he presented them with the Company's severance pay proposal. Kline informed Phillips that they should double the amount, as the employees had been good workers and good producers. Phillips replied that this was not bargainable, that "this is it, it's from the higherups." It is obvious that this issue was closed and was not open for negotiations and that the Company was acting in bad faith in attempting to compel the Union to agree to its proposal which was nonbargainable. According to Long, Phillips told them that this is what corporate sent down and this is all you will get. It is apparent that Kline did not agree with the Company proposal on severance pay, and he stated he wanted it doubled, and that he felt he should have the right to bargain about it. There is no doubt that the Respondent's position on this item was nonbargainable and this foreclosed any possibility of good-faith bargaining on this issue.

At the August 4 meeting the Company negotiators showed up with the Company counsel, Mr. George Gardner, and presented the Union with a typewritten memorandum of agreement which set forth the pro rata vacation schedule, the insurance benefits, and the Company's severance pay schedule. This agreement also contained a closing paragraph wherein the Union had to agree that the Company had bargained in good faith before the severance pay would be paid. It is undisputed that on June 22, Phillips informed the Union and the employees that there would be severance pay provided there was no sabotage of equipment. There is nothing in this record that would indicate that any employee was involved in any sabotage of any of the Company's equipment or the tools of their customers. In fact, in its August 13 letter, the Respondent admitted that there had been no sabotage or damage to equipment. It appears that the Company by August 4 had backed off of that promise and was then conditioning the payment of severance pay upon the Union's signing of the memorandum of agreement, stating that the Company had bargained in good faith about the closing of

the Del-Val facility and its effects on the employees.

In view of the Respondent's position at the June 30 meeting that the severance pay issue was not bargainable and the Union must accept what was offered; and in view of the Respondent's August 4 position that to get any severance pay the Union must sign the memorandum of agreement, agreeing that the Company had bargained in good faith throughout the negotiations, it is my conclusion that at all times material at the June 30 and the August 4 meetings the Respondent was engaged in bad-faith bargaining concerning the effects of the closing down of the Del-Val facility.

The Respondent argues that on August 13 it submitted a letter to Mr. Kline in which it offered to bargain about any aspect of the closing of the Del-Val facility. In that letter there is reference made to a letter from Kline to Phillips of August 6, regarding severance pay for the Del-Val employees. After discussing the fact that the Company was under no obligation to grant severance pay, and stating that the employees cooperated and that there was no sabotage or damage to equipment, the Phillips letter closes with this paragraph:

> My response to your demand in regard to severance pay was not as you have stated in your letter but that I would be glad to continue to bargain on the items which we agreed to and were reduced to the phaseout agreement I submitted to you at our meeting on August 4, 1976. When we reach total agreement, we will be glad to grant severance pay.

In view of the fact that the employer violated Section 8(a)(5) in refusing to bargain about the closing of the plant, and the fact that I have found that the employer bargained in bad faith about the effects of the closing, and assuming the August 13 letter to be an offer to bargain about the effects, it is my conclusion that the Union was under no obligation to take the August 13 letter at face value. It had been told at two other bargaining sessions that the purpose was to bargain about the effects of the closing. However, as soon as severance pay was mentioned they were told that it was not bargainable and at the last session it was not only not bargainable but the Union was advised that there would be no severance pay unless it agreed that the Respondent had not engaged in unfair labor practices. In fact, I

am not quite sure that the August 13 letter is an offer to meet and discuss all of the aspects of the closing of the plant. The Respondent closes its letter by stating that "when we reach total agreement we will be glad to grant severance pay." Thus, it appears that all items must be resolved before severance pay will be considered. As Respondent had already advised the Union that severance pay was not bargainable, it is my conclusion that a remedial bargaining order is required to compel the Respondent to bargain in good faith about the effects of the closing, including severance pay.

The Complaint alleges that Respondent engaged in independent violations of Section 8(a)(1) of the Act by, on or about June 22, posting a notice at the Nylomatic facility informing employees of the phaseout of the Del-Val plant; (2) by informing Nylomatic employees by letter of the phaseout of its Del-Val plant and warning the employees of the negative effect that unionism would have on the Nylomatic plant's profitability; (3) and by, on or about June 29 through Robert Worth, orally informing employees of the phaseout of the Del-Val plant. The General Counsel argues that by these three enumerated acts during the organizational campaign at the Nylomatic facility the employer was impliedly threatening its employees to close the Nylomatic facility in the event of unionization.

It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. The employer may even make a prediction as to the precise effects he believes unionization will have on his company, but that prediction must be carefully phrased on the basis of objective facts to convey his belief as to demonstrable probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there be any implication that the employer may or may not take the action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on the available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the first amendment. An employer is free only to tell

what he reasonably believes will be the likely economic consequences of unionization that are outside his control, and not threats of economic reprisal to be taken solely on his own volition. See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618, 619 (1969).

The union organizational campaign in this case began on March 1 with the mailing of a letter and authorization cards to the Nylomatic employees. A second mailing was around March 10 or 11. On March 11, the Union notified the employer that it represented a majority of their employees and requested recognition. The employer denied recognition doubting the Union's majority status. Had the employer left matters as they were at this point in time no problem would have arisen and the election which was ultimately directed for July 1, would have taken place without any problems. However, the employer did not leave things as they were. In fact, it began the implementation of a prior probability that the Del-Val plant would be closed, and began immediately upon evaluating the future profitability of that unionized plant. It was around June 17 when the final decision to close the Del-Val plant was arrived at by the Respondent and that decision was final.

Midland-Ross could not wait to notify the Nylomatic employees of this decision. Thus, on June 22, the same day in which they informed the Union at Del-Val and the employees at Del-Val that the plant would be closed, they posted the same notice on the bulletin board at the Nylomatic facility notifying the Nylomatic employees that the Del-Val facility would be closed. The Respondent was well aware of the fact that a union election was forthcoming on July 1. The employer was also well aware of the fact that the employees at Nylomatic were aware that the Del-Val employees were unionized and were operating under a union contract. The employer admitted that the only notices which had previously been posted at the Nylomatic facility were those that affected both facilities such as notices about picnics and vacations, etc.

The employer justifies its posting of the notice of the Del-Val closing on the Nylomatic bulletin board by stating that it was necessary because certain employees who work at the Nylomatic facility, such as those in the payroll section, personnel office, and many supervisors, also cover the Del-Val facility, and the

posting was to inform these people of the closing because they were vitally interested in the continuation of the Del-Val facility. This explanation might be adequate and acceptable but for the fact that the next day on June 23 the Respondent mailed a letter addressed to all of the Nylomatic production and maintenance employees from plant manager Robert Worth again informing the employees of the closedown of the Del-Val facility. This letter explained the losses at the Del-Val facility in 1975 and the losses for the first 6 months of 1976. The employer expressed its regret of the closing of the Del-Val facility but indicated that this would permit it to concentrate on Nylomatic's survival. Thus, indicating to the employees that there was something economically wrong at the Nylomatic facility. The letter stated that Nylomatic had lost $250,000 in 1975 and showed a slight profit during 1976, and that increases in wages and benefits are available only when earnings are there to justify them. The letter pointed out that the last wage increase at Nylomatic cost in excess of $70,000, and that with the phasing out of the Del-Val operation Nylomatic will have the highest rates in the area. The letter stated that as each plant has to stand on its own it was hoped through the efforts described in the letter that management would be able to make Nylomatic a profitable enterprise. Thus, again indicating that it was not. The letter concluded by stating that the Company did not want a third party in the plant because a third party may create complex working conditions, it might have to hire unnecessary workers and it may have work stoppages, strikes, or slowdowns, all of which have a negative effect on the profitability of the plant. The letter also informed the employees that even though they had signed authorization cards they still had the right to vote in an election and they could vote no to dues, no to strikes, no to violence, and no to encouragement of distrust between us. There is no getting around the fact that this letter was intended and in fact did indicate that unionization can lead to the disruption of production and the loss of plant profitability which can lead, as shown at the Del-Val plant, to plant shutdown. The Company did not point in any way to any objective fact that could cause economic problems at the plant. They did point, however, to the fact that there might be slowdowns, shutdowns, work stoppages, violence and distrust among the employees and

the management. There is nothing in this record to indicate that there was ever a strike at the Nylomatic facility or the Del-Val plant; that there was ever any mistrust between the Company and the Union, or that there was ever any slowdowns or work stoppages. These certainly are not objective considerations as enunciated in the *Gissel* case.

The clear implications are that because the Del-Val facility had lost money it was shut down; that the employees knew that Nylomatic's economic position was precarious and that unionization will cause a loss of money and therefore the employees were risking a shutdown of this plant. This same message was reiterated during the meetings with the emloyees of each shift, 2 days before the election. The same presentation was given at each meeting. The employees were told again that the Del-Val facility had suffered financial losses over many years and that management had finally decided to close it down. Phillips told the employees that if they did not go union when the Company profits they would profit. A clear promise of benefit if they voted against the Union. Carl Engle, the sales manager, told the employees that the plant was very profitable without a union; and warned that unionization could hurt business because when a union is in the plant they could not promise that sales would be delivered on time because of strikes; and he therefore could not promise customers an exact date for deliveries and in these types of circumstances a union could hurt business. Again no objective facts were presented to support management's thesis that unionization would have dire economic consequences at Nylomatic. Management admitted that these meetings were basically in reference to the upcoming election.

It is my conclusion that the actions of the Respondent, as enumerated above, were part of its grand design to intimidate employees by suggesting, in the absence of any objective criteria that unionization can lead to plant shutdown. The Respondent's conduct clearly shows that it intended the Del-Val closing to have an impermissibile effect on the employees' deliberations concerning unionization at Nylomatic, and in my view violative of Section 8(a)(1) of the Act.

The Complaint also alleges that the Respondent's phaseout and shutdown of operations at the Del-Val facility were timed

and implemented in order to affect the outcome of the election, and to discourage the employees at Respondent's Nylomatic plant from designating a labor organization as their collective-bargaining representative.

In *Textile Workers Union of America v. Darlington Manufacturing Co., et al.,* 380 U.S. 263, the Supreme Court stated:

> If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed if they persist in organizational activities, we think that an unfair labor practice has been made out.

Thus, the Supreme Court states that although an employer has an absolute right to terminate its entire business for any reason it pleases, it may not partially terminate a business where such termination is motivated by a purpose to chill unionism in any of its remaining plants, and where the employer may reasonably have foreseen that such closing would likely have that effect.

As the Board had made no findings with respect to the effect of the closing on employees at other of the employer's plants the case was remanded to the Board for further proceeddings.

In the remand, *Darlington Manufacturing Co.,* 165 NLRB 1074 the Board stated:

> In concluding that such a purpose to chill existed, we have relied upon what we consider to be a fair inference arising from the totality of the evidence, considered in the light of the then-existing circumstances. Respondent argues that the Supreme Court is requiring concrete, specific, independent proof of a purpose to chill unionism. Insofar as this formulation is intended to be a restatement of the Court's standard that there must be a showing of motivation which is aimed at achieving the prohibited affect we concur. But the requisite motivation may be proved

by something less than direct evidence, rarely available in cases of this kind. In this branch of the law, as in all other, proof of motive may be supplied by circumstantial evidence which affords a sound basis for drawing inferences.

The Board found that *Darlington* did intend to chill unionism in its remaining plants based primarily upon repeated expressed hostilities of the Company toward the Union. In *George Lithograph,* 204 NLRB 431, the Board found that the chilling may be inferred from the foreseeability of the employer's actions upon the employees.

I have previously found this was a partial closing in that the employer closed only its Del-Val facility, and the Nylomatic facility remained an operating concern, as well as 27 of the employer's other plants. The General Counsel and the Charging Party do not appear to question that the Respondent's decision to close the Del-Val facility was based upon legitimate economic considerations. But they argue that the employer nonetheless timed and implemented the closing to have the maximum impact on the employees at the Nylomatic facility to influence their decision on the forthcoming election. The employer on the other hand contends that the Del-Val facility was closed for economic reasons only and that the timing and implementation of the closing was due to the lack of customer orders because they pulled their tools out and cancelled further orders, and by the fact that the Company had to notify the landlord by June 30 of its intention to cancel its lease. It is a fact, the lease extended until December 31, and if it was not cancelled by June 30, it would automatically renew itself for another year. There is no question but that the lease had to be cancelled prior to June 30, and I so find. While the notification to the landlord of its desire to cancel the lease by June 30 was a necessary requirement, and explains why it was necessary to reach a decision by that date, it fails to explain why the facility was actually closed so precipitously, and why the employees at Nylomatic had to be notified prior to the July 1, election. The Company argues that it had to notify that employees at the same time it notified the landlord because the fact of the closing would have been leaked to the employees by the landlord and this would have upset the employees more than if the employer had notified them. I find

this very hard to believe because there is no evidence in this record to even suggest that the landlord was aware of the union election at the Nylomatic plant or would have been in any way concerned. It is my view, that the employer could have notified the landlord of its decision to close the plant at any time prior to June 30 without also notifying the employees of the impending phaseout of the Del-Val operation. In my view this was not a consideration at the time the employer made its decision to close but in fact was an afterthought as a defense to the impromptu notification of its impending phasing out of the Del-Val facility.

There are other considerations as suggested by the General Counsel that gives rise to the conclusion that the timing and implementation of the closing was done to chill unionism at the Nylomatic plant. In this connection it is noted that although the Del-Val facility had been losing money since 1974 it was not until April of 1976, shortly after the filing of the union petition that management at Del-Val began seriously to consider the closing of the Del-Val facility. At this point they commissioned the preparation of the PAR. This PAR was submitted on June 4, with the recommendation to close the Del-Val facility, and was finally approved on that recommendation on June 17 just 2 weeks prior to the July 1 election.

Also the preparation of the PAR and the decision to close the Del-Val facility were made in a very secretive manner and the Company in no way notified the Union of its intention to close the plant until the decision had been finally made. And even then the employer did not notify the Union until June 22, 5 days after the decision had been made and 9 days before the election at the Nylomatic plant. At this point the Company took very careful steps to notify the employees at the Nylomatic plant of the closing of the Del-Val facility. These various steps to notify the Nylomatic employees of the Del-Val closing and the consequences from that have been discussed in a previous section of this decision and found to be violative of Section 8(a)(1).

The one factor which I consider most important is the timing of the notification to the Nylomatic employees. It is my view that the Del-Val facility would ultimately have closed for economic considerations, and in all probability this would have

occurred around December 31. Although I consider the closing to have been purely for economic reasons, its acceleration and the timing of the notification to the Nylomatic employees were designed to have an impact on the Nylomatic employees.

Thus, it is my conclusion that the Respondent could have notified the landlord prior to June 30 of its intention not to renew the lease, without the landlord exposing the Respondent's hand to the employees, because there is no evidence to indicate that the landlord was even concerned or knew about the Union's organizational campaign at the Nylomatic plant. The Del-Val employees were due to take their vacations beginning July 1, the date of the election. They were to return to the plant on July 19. At the time the employer notified the employees of its intention to phase out the Del-Val facility it gave no exact date when the closeout would be final. Thus, when the Del-Val employees left for their vacation they were not aware of the date upon which the Del-Val facility would be closed. It is quite possible that many of them assumed like union representative Kline that this was only a threat of closing in order to affect the vote of the Nylomatic employees. Needless to say the Respondent could have withheld the notice of June 22 and notified the employees of its intent to close after the election so that it would not have interfered with the election. This brings me to the inescapable conclusion that the Respondent's sole purpose of announcing the closing of the Del-Val facility on June 22 was to chill unionism at the Nylomatic plant. Not only was this a foreseeable result, but in fact did occur as several of the employees testified that once they learned of the fate of the Del-Val facility they knew that the Union was not for them. The results of the election also demonstrate this fact. Accordingly, I conclude that by the timing and implementation of the closing of the Del-Val facility the employer intended to chill unionism at the Nylomatic facility and thereby engaged in conduct violative of Section 8(a)(3) and (1) of the Act. See *Darlington, supra.*

The Complaint also alleges that unit A, as described above, constitutes an appropriate unit for the purpose of collective-bargaining; that since June 5, a majority of the employees in unit A designated the Union as their majority representative and since March 10, the Union has demanded that Respondent

bargain collectively with it; that since on or about June 17, Respondent has failed, and continues to fail, to recognize and bargain with the Union notwithstanding its majority status; and that because the employer's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act are so serious and substantial in character and affect the entry of a remedial order requiring the Respondent to recognize and bargain with the Union in unit A is warranted. Stated otherwise the General Counsel is requesting that a bargaining order be entered against Respondent because following its refusal to bargain with the Union it engaged in unfair labor practices so serious as to make the holding of another election impossible.

In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 the Supreme Court approved the issuance of bargaining orders where an employer's conduct had a tendency to undermine the union's majority of strength and impede the election process. The Court stated that in certain cases where the employer's conduct is so outrageous and pervasive the Board and the Courts have approved the issuance of a bargaining order. In such cases, however, the Court pointed out that there must be a showing that at one point the Union represented a majority of the employees involved. In fashioning the remedy the Board can take into consideration the employer's unfair labor practices and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election is slight then on balance a bargaining order should issue.

The General Counsel argues that this is an appropriate case for a *Gissel* bargaining order in view of the fact that the Union did at one point have a majority status in unit A and that the employer's unfair labor practices, which I have previously found, will have a lasting effect in the mind of the employees in the Nylomatic facility and that the holding of a second election at that facility would be futile.

I will deal first with the question of whether the Union ever represented a majority of the employees in an appropriate bargaining unit. The employer argues (1) that unit A is not the appropriate unit to use to determine whether the Union represented a majority of employees, but on the other hand argues that the Union must demonstrate that it represented a

majority of the employees in the unit in which it petitioned for, which was a unit consisting of all production and maintenance employees and the toolroom employees which would be a combination of unit A and unit B. Secondly, the employer argues that the cards submitted by the General Counsel are invalid because the employees testified that they were under the impression that they were signing these cards solely for the purpose of obtaining a Board election.

As to the first contention made by the Respondent it is true that when the Union petitioned for an election it sought a unit consisting of all production and maintenance employees including shipping and receiving employees and toolmakers consisting of approximately 75 employees. It is this unit that Respondent contends that the Union is bound by and that its majority status must be shown among these approximately 75 employees. The General Counsel argues that it is not the unit that the Union petitioned for that it must show its majority status in, but the unit which was in fact found appropriate by the Board, which is unit A consisting of only the production and maintenance employees. A unit of approximately 68 employees.

In the *Gissel* case the appropriateness of the units involved were not in question. Here, although the Union petitioned for a unit consisting of all production and maintenance unit employees as well as the toolroom employees the Regional Director with Board approval found that a unit consisting of the production and maintenance employees alone was the appropriate unit. That unit is called unit A. Unit B consisted of the toolroom employees. On review the Board agreed with the Regional Director's unit findings but gave the employees in the toolroom unit, unit B, an opportunity to decide whether they wanted to be represented by the Union, or by the Toolworkers Union. It is my conclusion that it makes no difference what unit is actually petitioned for by the union involved, the Union's majority status must be shown at some point in the unit which is ultimately found to be appropriate by the Board. As this unit consisted of 68 employees then it is incumbent upon the General Counsel to establish that at some point the Union represented a majority of the employees in that unit.

In support of its conclusion that the Union represented a majority of the employees in unit A, the General Counsel called

some 38 employees to the witness stand who testified concerning their authorization cards which they gave to the Union and which were given by the Union to the Region in connection with the representation case and which have been in the exclusive hands of the Region since that time.

The Respondent objects to the use of cards to establish the majority status of the Union, apparently taking the position that the employees signed, dated, and returned these cards to the Union solely on the belief that they were given confidentially and for the sole purpose of obtaining an election before the National Labor Relations Board. In this connection the Respondent was permitted wide latitude in cross-examining each employee as to why he signed the authorization card. Many of the employees testified that they signed these cards because they thought that ultimately there would have to be an election before the Union would be their representative. Many testified that they signed the card to obtain additional information about the Union. The Respondent inquired quite extensively into the subjective intent of the employee in signing the authorization card.

Generally, however, the subjective intent of the employee in signing the union authorization card is irrelevant.

In the *Gissel* case the court was confronted with the problem of whether the authorization cards could be taken at face value or whether you could inquire into the subjective intent of the signer. The court stated:

> Under the *Cumberland Shoe* doctrine,[12] if the card itself is unambiguous (i.e. states on its face that the signer authorizes the Union to represent the employees for collective-bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purposes of obtaining an election.

In deciding this matter the court at page 606 in the *Gissel* decision stated:

> In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the

12. *Cumberland Shoe Corporation,* 144 NLRB 1268 (1963).

clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the Union to represent him and then telling him that the card will probably be used first to get an election.[13]

* * * * *

We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else.

* * * * *

We agree, however, with the Board's own warnings in *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the Union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

In applying these principles to the case at bar it appears that unless the employees were told by the solicitor of the card or some other union adherent or union representative that the cards were solely for the purpose of obtaining an election, the card is valid and should be counted towards establishing the Union's majority status notwithstanding the employees' subjective intent. The record is clear in this case that at no time prior to the mailing of the cards to the Nylomatic employees did the Union have any conversations with the employees. The only contact with any employee was a call from an employee to the

13. *Gissel, supra* at 584.

Union which precipitated the May 1 mailing of the letter and the authorization cards. The response by the employees was so great that around March 11 the Union had a second mailing of the letter and the authorization cards. It was after this that the Union had several meetings with the employees. There is no evidence in this record that any employee was told by any union representative, union adherent, or any solicitor of cards that the purpose of the card was solely to get an election. In fact, none of the 38 employees who testified indicated that they were told by anybody that the sole purpose of this card was to obtain an election. On the contrary 28 of the 38 employees who were called to testify concerning their cards testified that they read the card, that they signed the card on or about the date indicated thereon and returned the same to the Union. Eight testified that they read the cards, that they signed them and returned them to the Union. However, they indicated that the date placed on the union card was not put there by them, but they did indicate that they signed the card around the date placed thereon. Roy Albert, the union representative who was in charge of the organizational campaign at the Nylomatic plant, testified that as these cards were received he checked them for signature and date and those cards that were not dated he placed the date thereon on the day in which the cards were received through the mail. This testimony is uncontradicted and I accept it as being the date on which the card was returned to the Union.

One employee, James Houston, testified that he received the card, and signed it, but could not recall returning it to the Union. The date on that card is 11/3/76. By way of explanation of that date, Houston testified that he was in the military and it is their fashion to first put the month and then the day and the year, and this may be the reason why the card was dated in this manner. But in any event, regardless to the date placed on the card, Houston testified that he signed the card around the time that the others had received their cards, and most of these cards were signed in March and Houston's card was among those mailed in by the Union to the Region on March 19. I accept this card as a valid authorization card. One other employee, Grace Burns, testified that she signed a card and returned it to the Union which looked like the card that was presented to her, but since it was out of her possession she could not say whether it

was her signature or not, or that this was in fact the card she signed. She admitted that she had signed and returned to the Union a card around the date which was on the card which was presented to her and introduced into evidence. This card was sent to the Region and kept there until the hearing. In view of her testimony that she did in fact sign an authorization card on the date in question, I accept this card as being the valid authorization card of Grace Burns.

All of the employees who gave testimony relating to their union authorization cards testified to the fact that they read the card and that they understood what the card meant, and none of them testified that they were misled by any union representative or union adherent. As these cards are unambiguous on their face, and clearly authorized the Union to represent the signer as his collective-bargaining representative and to request negotiations from any employer as his bargaining agent it is my conclusion that these are valid authorization cards and may be used to demonstrate the majority status of the Union. Accordingly it is my conclusion that the General Counsel has established that a majority of the employees in the production maintenance unit, unit A, the appropriate unit, as found by the Board, signed authorization cards designating the Union as their bargaining representative.

As indicated previously the Union lost the election of July 1, as a majority of the employees voted against representation by the Union. The General Counsel contends that this change in heart of the employees was a result of the employer's unfair labor practices which chilled unionism at the Nylomatic facility, and that a fair election cannot be held and a bargaining order is appropriate under *Gissel.* In situations like this where a union enjoys a majority status on a given date in an atmosphere free of unfair labor practices, and then subsequently loses that majority in a Board election we must look to intervening circumstances to determine what caused the loss of majority status. If there were intervening unfair labor practices which can be attributable to the loss of majority, then a bargaining order may be appropriate. The question is whether the employer's conduct has or will prevent the employees from exercising their free choice in a second election.

In the circumstances of this case the employer's unfair labor

practices being the 8(a)(1) violations of notifying its employees of the closing the Del-Val facility and its implied threats that if unionization is gained at the Nylomatic plant a similar result will occur there, and the employer's timing of the notification to these employees which I have found to have a chilling effect on the employees, it necessarily follows that a free election cannot be held in these circumstances. Accordingly, it is my conclusion that a *Gissel* remedy in these circumstances is appropriate. Because the employer refused to bargain with the representative of a majority of its employees in an appropriate unit, and began its unlawful unfair labor practices on or about June 22, I shall order that the employer be required to recognize and bargain upon request with the Union as of June 22. See *Trading Port, Inc.*, 219 NLRB 298.

IV. *The Effects of the Unfair Labor Practices Upon Commerce*

The activities of the Respondent set forth in section I, above, occurring in connection with Respondent's operations, have a close intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union regarding its decision to close down the Del-Val facility and its failure to bargain in good faith with the Union regarding the effects of such decision upon the employees I shall order that Respondent be required upon request to bargain collectively with the Union concerning its decision to close the Del-Val

facility and the possible reopening of that facility.[14]

I have found that the timing and implementation of the closing were discriminatory in violation of Section 8(a)(3) and designed to affect the desires of the employees in their voting for the Union at the Nylomatic plant. As this unilateral action on the part of the employer as well as the discriminatory nature of the action caused all of the employees at the Del-Val facility to be terminated on July 19, and had the Respondent honored its statutory obligation to bargain concerning the decision to close and the effects of the closing, these employees might not have been terminated at all, but may have retained their jobs at least until the Respondent had fulfilled its bargaining obligations, or until the plant would have been closed as a result of the expiration of the lease on December 31.[15] Effectuation of the Act's policies require that the employees whose statutory rights were invaded by reason of the Respondent's unlawful unilateral ac-

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14. Under the circumstances in this case the General Counsel does not seek a reopening remedy. In view of the Board's reluctance to order the resumption of operations at a closed facility, particularly where that facility has been closed for some time and the Respondent does not own the premises, such a requirement would be excessably burdensome. See *Burroughs Corporation*, 214 NLRB 571. Normally as this plant would have been closed ultimately for economic reasons, and would have been closed for some time no useful purpose would be served by requiring further bargaining with respect to the decision to close the plant. Here, however, the timing of the notice to close as well as the closing were so timed and implemented as to cause a chilling effect upon the employees in the Nylomatic plant. Under these circumstances, I feel that the Company should bargain with the Union concerning its decision to close the plant.

15. When the Respondent notified the Union of its decision to close on June 22, it gave no date as to the final closing. Therefore there is no way I can determine when the plant would have been closed by its fulfillment of all its customers' orders. However, certain factors here do indicate that had it not been for the intervening petition for representation by the Union that this plant might well have continued until the expiration of the lease on December 31. In this regard it is noted that during April, May, and June, of 1976, employees were recalled who had been laid off and the work force was increased beyond its normal capacity. The Respondent argues that this was done because certain machinery was repaired which had been sitting idle, and they had an excess amount of backlog orders because of the broken machinery and they had to have additional employees to perform this work. On the other hand the General Counsel argues that the employer recalled and rehired addi-

tion and its discriminatory timing and implementation of the plant closing, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedy its violations by doing what it should have done. Accordingly, I shall order that Respondent make whole all the employees on the payroll at the Del-Val facility on July 1, for any loss of pay suffered by them as a result of Respondent's refusal to bargain about the decision to close the plant and its failure to bargain in good faith about the effects of the closure and its discriminatory timing and implementation of the closing from July 1, to December 31, the date I have found that the plant would have been closed by the fulfillment of all of its customers' orders, by paying to each of them a sum of money equal to the amount each would have earned as wages during that period. Backpay shall be computed upon the earnings which the terminated employees would normally have received during the applicable period less any interim earnings and shall be computed on a quarterly basis in the manner set forth in *F.W. Woolworth Company,* 90 NLRB 289 and *Isis Plumbing & Heating Co.,* 138 NLRB 716. Interest thereon shall begin 5 days following issuance of this decision.

I have found that Respondent engaged in unfair labor practices forbidden by Section 8(a)(1), (3) and (5) of the Act in the timing and implementation of the closing and its effects, and that such activities by Respondent were pervasive and interfered with the exercise of a free choice if an election were held and also tended to foreclose the possibility of holding a fair election; that Respondent committed a violation of Section 8(a)(5) of the Act by refusing to recognize the Union in an appropriate unit at

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tional employees for the sole purpose of cleaning up all the work so that they could close the plant as soon as possible. The General Counsel's witnesses testified that in June, around the time the Company announced its closing that there were many orders to be filled in the plant. It is a fact that many of the orders along with the machinery were shipped to the Nylomatic facility and were ultimately worked on in January and February of 1977. Under these circumstances I conclude that the Respondent's hiring of additional personnel during this period involved, April, May, and June, was for the sole purposes of cleaning up the work around the plant so that the facility could be closed as soon as possible. Thus, it is my conclusion that if things had been left alone by the Respondent the plant would have operated until December 31.

the Nylomatic facility and that a bargaining order was proper and that an election was not required and the employees' sentiment once expressed in cards will be protected by a bargaining order without an election.

If in the bargaining concerning the closing of the Del-Val facility and its effects upon the employees the parties should agree to resume operation of that facility the Respondent is required to offer all the former Del-Val employees, in the appropriate unit, reinstatement to their former jobs, or substantially equivalent positions, if their former jobs are no longer available. If no agreement to resume operations is reached, the Respondent shall establish a preferential hiring list for all such Del-Val employees following its established seniority system, and if operations are ever resumed at the Del-Val facility, or a similar operation is established in the area, to offer reinstatement to all such employees. Additionally Respondent shall establish a preferential hiring list separately for each of its other plants now in existence or hereafter established in the Continental United States, including the Nylomatic facility, with priority of employment on each such list to the former employees of the Del-Val facility in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by Respondent in the conduct of its business; and thereafter offer such employees reinstatement and employment at each such plant as such employment becomes available and before other employees are hired for such work, together with one-way expense and travel thereto of said employee and his dependents, and other necessary and reasonable expenses of relocation; provided, that any such employee's failure to apply for or accept reinstatement and employment at any of such plants on such preferential basis shall not thereafter disqualify him from such preferential reinstatement and employment at any other of Respondent's said plants, nor shall it excuse Respondent from the requirement of offering him such reinstatement and employment, on a preferential basis, at such of its other said plants at which said employee has not heretofore been offered and refused such reinstatement and preferential employment; but Respondent may remove from each such specific plant preferential hiring list the name of any employee who has been offered, but has refused or rejected, preferential employment at that specific plant.

Upon the basis of the foregoing findings of fact and the entire record of this case I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce as defined in Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By posting a notice on June 22, at its Nylomatic facility informing the Nylomatic employees of the phaseout and closing of the Del-Val facility; on June 23, informing its Nylomatic employees by letter of the phaseout of the Del-Val facility and warning employees of the negative effect that unionization would have on the Nylomatic plant's profitability; and on June 23, informing its Nylomatic employees by letter of the phaseout of the Del-Val facility and warning employees of the negative effect that unionization would have on the Nylomatic plant's profitability; and on June 29, through plant manager Robert Worth orally informing employees of the phaseout of the Del-Val facility, Respondent impliedly threatened its Nylomatic employees that it would close the Nylomatic facility in the event of unionization in violation of Section 8(a)(1) of the Act. By the timing and implementation of the closing of the Del-Val facility for the purpose of discouraging membership in, sympathy for, or activity of, the Union and to chill the exercise of the Section 7 rights of its employees, Respondent has engaged in conduct violative of Section 8(a)(3) of the Act.

4. By discouraging membership in the Union or any other labor organization of its employees by discriminating in regard to their hire or tenure, or other terms and conditions of employment Respondent has violated Section 8(a)(3) of the Act.

5. All production and maintenance employees including shipping and receiving employees, janitors and truckdrivers at Respondent's Del-Val plant but excluding all employees in the bargaining unit for which the Toolmakers are certified, and all office clerical employees, lab technicians, technical employees, professional employees, guards and supervisors as defined in the Act constitute an appropriate unit for the purpose of collective bargaining.

6. By refusing to bargain collectively with the Union in the appropriate unit listed in paragraph 5 above, about its decision to close the Del-Val facility Respondent has engaged in conduct in violation of Section 8(a)(5) of the Act.

7. By bargaining in bad faith with the Union in the bargaining unit described in paragraph 5 above, about the effects of the closing of the Del-Val facility the Respondent has engaged in conduct violative of Section 8(a)(5) of the Act.

8. All production and maintenance employees including shipping and receiving employees, production control clerks, and mold maintenance employees, but excluding all toolmakers, apprentice toolmakers, toolroom leaders, professional and office clerical employees, lab technicians, guards and supervisors constitute an appropriate unit at the Respondent's Nylomatic facility.

9. Since on or about June 22, and at all material times thereafter, the Union represented a majority of the employees in the unit set forth above in paragraph 8, and has been the exclusive representative of said employees for the purpose of collective-bargaining within the meaning of Section 9(a) of the Act; and Respondent was on that date, and has been since, legally obligated to recognize and bargain with the Union as such.

10. By refusing to recognize and bargain collectively with the Union in regard to the employees in the unit set forth in paragraph 8 above, since on or about June 22, the Respondent has committed unfair labor practices prohibited by Section 8(a)(5) and (1) of the Act.

11. The above described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended order:[16]

16. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees at its Nylomatic facility with plant closure if they support the Union by posting notices on the Nylomatic facility bulletin board announcing the closure of other Midland-Ross facilities.

(b) Threatening employees at its Nylomatic facility with plant closure if they supported the Union by mailing letters to the Nylomatic employees informing them of the closure of its Del-Val facility, or any other Midland-Ross facility, warning employees of the negative effect that unionization would have on the Nylomatic plant's profitability.

(c) Threatening employees at its Nylomatic facility with plant closure if they supported the Union by orally informing employees of the phase out of the Del-Val facility and other Midland-Ross plant closures.

(d) Timing and implementing a plant closure for the purpose of discouraging membership in, sympathy for, and activities on behalf of the Union.

(e) Discouraging membership in United Glass and Ceramic Workers of North America, AFL-CIO, CLC or any other labor organization of its employees, by discriminating in regard to hire, tenure, or any other term and condition of employment.

(f) Failing and refusing to bargain in good faith with the Union as the exclusive bargaining representative of all of the employees in the above-described appropriate unit at the Del-Val facility concerning its decision to close the Del-Val facility.

(g) Failing or refusing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit at the Del-Val facility about the effects of the closing of that facility on its Del-Val employees.

(h) Failing or refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the above-described appropriate unit at the Nylomatic facility.

(i) In any other manner interfering with, restraining, or

coercing its employees in the exercises of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and bargain with the Union as the exclusive representative of all the employees in the above-described unit at the Del-Val facility concerning its decision to close the Del-Val plant.

(b) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the above-described unit at the Del-Val facility concerning the effects of the closing of the Del-Val facility on the Del-Val employees.

(c) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit at the Nylomatic facility.

(d) Make whole all employees or former employees of the Del-Val facility who were on the payroll as of July 1, for any loss of pay suffered as a result of the discrimination against them on that date until December 31, the date on which the plant would have closed by fulfilling all of the customer orders and expiration of the lease, with interest thereon beginning 5 days after the issuance of this Decision. Place all of the employees who were employed at the Del-Val facility on July 1, on a preferential hiring list separately for each of its other plants now in existence or hereinafter established in the Continental United States including the Nylomatic facility, with priority of employment on each such list to said employees in accordance with such system of seniority or other nondiscriminatory practices heretofore applied by Respondent in the conduct of its business and thereafter offer such employees reinstatement and employment at each such plant in the manner set forth in the part of this decision entitled "The Remedy."

(e) Preserve and, upon reasonable request, make available to the Board and its agents, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay due under the terms of this recommended order. Post at all of its facilities throughout the United States, including the Nylomatic facility at Morristown, Pennsylvania, copies of the attached notice

marked "Appendix."[17] Copies of said notice, after being signed by a duly authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily displayed. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 4, in writing, within 20 days from receipt of this Decision, what steps have been taken to comply herewith.

It is further ordered that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. April 24, 1978

James T. Youngblood
Administrative Law Judge

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17. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX C

JUDGMENT OF THE COURT BELOW

Order Filed April 22, 1980
In No. 78-2556 in the United States Court of Appeals
For the Third Circuit

Before: Seitz, Chief Judge, and Adams and Weis, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Electrical Products Division of Midland-Ross Corporation, Tullytown and Morrisville, Pennsylvania, to review a certain order by the National Labor Relations Board issued against Petitioner on November 17, 1978, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on January 8, 1980, and has considered the briefs and transcript of record filed in this cause. On March 18, 1980, the Court being fully advised in the premises handed down its opinion denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Electrical Products Division of Midland-Ross Corporation, Tullytown and Morrisville, Pennsylvania, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

APPENDIX D

JUDGMENT ON THE PETITION FOR REHEARING

Order Filed May 27, 1980
In No. 78-2556 in the United States Court of Appeals
For the Third Circuit

(May 27, 1980)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Dated: May 27, 1980

By the Court,

/s/ SEITZ
Chief Judge

APPENDIX E

ORDER STAYING MANDATE

In No. 78-2556 in the United States Court of Appeals
For the Third Circuit Filed June 5, 1980

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 17, 1980.

Dated: June 5, 1980

/s/ SEITZ
Chief Judge

APPENDIX F

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*); the relevant provisions of which are as follows:

"Sec. 8(a) It shall be an unfair labor practice for an employer—"

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

(29 U.S.C. Sec. 158(a)(5))

* * *

REPRESENTATIVES AND ELECTIONS

"Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment..."

* * *

"Sec. 10(e) The Board shall have power to petition any court of appeals in the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not

been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(29 U.S.C. Sec. 159(a), 160(e))

No. 80-67

SUPREME COURT, U.S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELECTRICAL PRODUCTS DIVISION OF MIDLAND-ROSS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably exercised its remedial authority in imposing a bargaining order on petitioner with respect to one of two separate bargaining units of petitioner's employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-31) is reported at 617 F. 2d 977. The decision and order of the National Labor Relations Board (Pet. App. 32-38) are reported at 239 N.L.R.B. 323.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78) was entered on April 22, 1980. A petition for rehearing was denied on May 27, 1980 (Pet. App. 79). The petition for a writ of certiorari was filed on July 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 81-82. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1), which provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

STATEMENT

Beginning in April 1974, petitioner owned and operated two plants, one located in Tullytown, Pennsylvania (Del-Val), and another located in Morrisville, Pennsylvania (Nylomatic), where it produced plastic products (Pet. App. 39). Pursuant to representation petitions filed by the United Glass and Ceramics Workers of North America, AFL-CIO-CLC (Ceramics Workers) and by the International Union of Tool, Die and Mold Makers, a/w American Craftsmen Association (Toolmakers), the Board conducted representation elections on July 1, 1976,

in two separate units (Unit A and Unit B) of petitioner's Nylomatic employees (*id.* at 40-43).[1] Production and maintenance employees, Unit A, voted on whether or not they wished to be represented by the Ceramics Workers, while the toolroom employees, Unit B, chose between being represented in a separate Unit B by the Toolmakers, by the Ceramics Workers along with Unit A employees, or by neither union (*id.* at 42-43). Just prior to the elections, Nylomatic employees were informed that the Del-Val plant would be closed (*id.* at 46-47). Unit A voted against representation by the Ceramics Workers. Unit B voted for representation by the Toolmakers (*id.* at 48).

Following the filing of objections by the Ceramics Workers and petitioner, the Board set aside both elections (Pet. App. 48-49). Based upon unfair labor practice charges subsequently filed by the Ceramics Workers with respect to Unit A, the Board found that petitioner had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), by refusing to bargain with the Ceramics Workers about its decision to close the Del-Val plant and by bargaining in bad faith about the effects of the closing on unit employees; by timing and implementing the closing of the Del-Val plant with the purpose of chilling union activities at the Nylomatic plant; by impliedly threatening to close the Nylomatic plant if Nylomatic employees selected union representation; and by refusing to recognize and bargain with the Ceramics Workers as the representative of production and maintenance employees at Nylomatic (Pet. App. 73-74).

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[1]At the time, the Ceramics Workers represented Del-Val's production and maintenance employees while the Toolmakers represented Del-Val's toolroom employees (Pet. App. 40).

As a remedy for these unfair labor practices, the Board issued an order requiring, *inter alia*, that petitioner bargain with the Ceramics Workers on request in a production and maintenance unit of Nylomatic employees (Pet. App. 75).[2] The Board found that, due to petitioner's extensive unfair labor practices in this case, a free election could not be held and that the bargaining order remedy requested by the Ceramics Workers was therefore appropriate (Pet. App. 68-69). See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969).

The court of appeals enforced the Board's order in full (Pet. App. 8-31). Rejecting petitioner's challenge to the bargaining order issued by the Board, the court stated (*id.* at 22):

> Moreover, this case has all of the elements that we recently noted to be common where we have held a *Gissel II* order proper. * * * First, the implied threat was communicated to a "significant percentage of employees in the bargaining unit." Both the letter and the meetings involved every employee at Nylomatic. Second, the unfair labor practices involved senior company officials. They controlled the timing of the closing. The operations manager

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[2]The Board's order also required petitioner to cease and desist from the unfair labor practices found; to bargain with the Ceramics Workers on request concerning its decision to close the Del-Val plant and the effects of the closing on Del-Val employees; to make Del-Val employees whole for earnings lost as a result of the discriminatory early closing of the Del-Val plant; to offer unit employees reinstatement to their former or substantially equivalent positions if during bargaining petitioner agrees to resume the Del-Val operation, and, if petitioner does not agree to resume the Del-Val operation, to require it to establish a preferential hiring list for them based on seniority at all of petitioner's plants in existence or later established in the continental United States (Pet. App. 34-35, 75-77). Petitioner does not contest any of these provisions here.

> sent out the June 23 letter and posted the notices, and the June 29 meeting was run by him and the labor management relations manager and the sales manager. Finally, because the finding rests ultimately on a psychological impact on all the employees that is unlikely to dissipate, the factors undermining the first election would be present at any future election.

With respect to petitioner's argument that the Board acted inconsistently in issuing a bargaining order as to Unit A while the Board "permitted" a second election in Unit B, the court explained (Pet. App. 23; footnote omitted):

> Such an argument rests on a misperception of Board practice and rules. Although the mere fact that the union participates in an election and loses will not foreclose it from seeking a bargaining order in a subsequent unfair labor practice proceeding, *see Bernel Foam Products Co.*, 146 N.L.R.B. 1277 (1964), no bargaining order will issue unless the election has been set aside in a representation proceeding. *See Irving Air Chute*, 149 N.L.R.B. 627 (1964), *enforced*, 350 F. 2d 176 (2d Cir. 1965). The theory behind this rule is that the absence of a valid, outstanding election justifies a bargaining order. See *Photobell Co.*, 158 N.L.R.B. 738 (1966).
>
> The crux of *Irving Air Chute* is that the union first must have the election set aside in a representation proceeding and then start an unfair labor practice proceeding to get a bargaining order. Indeed, in the representation proceeding here, the union tried to get a bargaining order. The regional director refused to consider the request, noting that the unfair labor practice proceeding was the proper forum for that claim. Thus, contrary to what the employer claims,

the setting aside of the election in a representation proceeding does not express a view one way or the other as to whether a new election should be held or whether a bargaining order is more appropriate.

Here, the unfair labor practice charges filed by the union relate only to Unit A. At no time has the union asked for a bargaining order in Unit B. The Board did not hold that an election was possible in Unit B but not in Unit A. Instead, it merely set both elections aside in a representation proceeding and the union, for whatever reason, filed unfair labor practice charges relating only to Unit A. Although the Board has some latitude to expand the scope of the charge, it may not reach matters clearly not included in the scope of the complaint nor shown by the evidence at the hearing. * * *

In short, neither the representation proceeding nor the unfair labor practice proceeding involved the appropriateness of a *Gissel II* order in Unit B. Thus the NLRB did not make inconsistent findings because it was never presented with the question of whether a free election could be held in Unit B.

Judge Weis dissented from the enforcement of the bargaining order.

ARGUMENT

Where employer misconduct renders the chances of holding a fair election slight, the Board may issue a bargaining order as a remedy in an unfair labor practice proceeding. *NLRB* v. *Gissel Packing Co., supra,* 395 U.S. at 610-616. Petitioner does not dispute this settled principle nor does it contend that such a judgment could not be made on the basis of the unfair labor practices found to have been committed here. Petitioner does

contend (Pet. 6-7), however, that the fact that the Board allowed a second election to be held with respect to Unit B necessarily establishes that such an election could be held fairly, thus negating the propriety of a *Gissel* bargaining order.

For the reasons stated by the court of appeals (see pages 4-5, *supra*), there is no merit to this contention. No unfair labor practice charges were filed in connection with the Unit B election. The absence of appropriate unfair labor practice charges is a limit on the Board's power to find unfair labor practice violations and to issue remedies. See *NLRB* v. *Local 542, Int'l Union of Operating Engineers*, 329 F. 2d 512, 515 (3d Cir. 1964). Moreover, a *Gissel II* bargaining order, such as was issued here, is appropriate only when the charging union has obtained a majority of valid authorization cards from the unit employees. See Pet. App. 21; *NLRB* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 614. The record does not establish that either the Ceramics Workers or the Toolmakers had a majority of valid authorization cards from the employees in Unit B. Thus, in the absence of valid unfair labor practice charges based on a valid card majority, the Toolmakers could establish entitlement to a bargaining order only by winning a second election. These limitations on the power to seek a bargaining order with respect to Unit B are completely unrelated to the question whether petitioner's unfair labor practices minimize the possibility of holding a fair election. Accordingly, the failure to issue a bargaining order with respect to Unit B is in no way inconsistent with the issuance of the bargaining order with respect to Unit A.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

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